No. 10765

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NELSON B. CRAMER,

Appellant,

vs.

COL. JESSE G. FRANCE, etc.,

Appellee.

APPELLANT'S OPENING BRIEF.

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Jurisdiction.

This is an appeal from the order and judgment of the United States District Court, Southern District of California, Central Division, Hon. Ralph E. Jenney, Judge, discharging the writ of habeas corpus sued out by appellant and remanding appellant to the custody of the United States Army. [R. 113.]

The District Court had jurisdiction pursuant to the provisions of sections 451 and 453, U. S. Code (R. S. secs. 751, 753), it being contended that appellant was held in custody in violation of a law of the United States, namely, the Selective Service and Training Act of 1940, as

amended. The facts upon which said jurisdiction is based are set forth in the Amended Petition for Writ of Habeas Corpus [R. 2-51], namely, that appellant, formerly classified under said Act in Class II-C, was unlawfully detained and restrained of his liberty by respondent, the commanding officer of the Reception Center at Fort MacArthur, California, having been inducted into the armed forces of the United States following his reclassification in Class I-A by Selective Service Local Board No. 271, of Long Beach, California, which reclassification was void, in that it was made in violation of Section 5, subdivision (k), Selective Service and Training Act of 1940 (added Nov. 13, 1942, 50 U. S. C. A. Tit. War, Appdx. sec. 305). When, as in this case, a registrant has obeyed the order for his induction, he may then seek a review in habeas corpus proceedings to test the validity of his classification.

United States v. Grieme, 128 F. (2d) 811 (C. C. A. 3);

United States v. Kauten, 133 F. (2d) 703 (C. C. A. 2).

This Court has jurisdiction to review, on appeal, the final order of the District Court by virtue of the provisions of section 463, subd. (a), U. S. Code (Act Feb. 13, 1925, ch. 229, sec. 6, 43 Stat. 940, as amended June 29, 1938, ch. 806, 52 Stat. 1232).

Statement of Case and Questions Involved.

Appellant, a resident of South Dakota, temporarily residing in Long Beach, California, on registration day, registered on the day fixed by law for that purpose and became a registrant within the jurisdiction of Selective Service Local Board No. 271, a board composed of five members. In 1942, on the evidence then before it, the Local Board classified petitioner in Class II-C and deferred him from training and service as being a necessary man in an agricultural pursuit, namely, as a person engaged in farming his own property in South Dakota. [R. 4.]

On September 11, 1943, by a vote of three to two, after proper notice that it was about to reconsider his classification, the Local Board reclassified appellant in Class I-A, as immediately available for military service, notwithstanding additional evidence submitted by him in support of his request that he be continued in Class II-C and again deferred, and in the absence of any evidence showing a change in his occupation. On September 15, 1943, having learned for the first time of certain correspondence between the Local Board and one DeVelder, the Chairman of the United States Department of Agriculture War Board at Armour, South Dakota, prior to appellant's reclassification, appellant sought and obtained an opportunity to be heard by the Local Board. Appellant appeared before the Local Board on October 12, 1943, and on that day the Local Board again decided by a vote of

three to two that he was not entitled to deferment, and again (two members voting to the contrary) reclassified appellant in Class I-A. [R. 5-9.]

On October 18, 1943, appellant filed a notice of appeal from the Local Board to the Appeal Board, and the record was sent to the Appeal Board sometime after October 29, after the "inclusion of additional information" therein by direction of the Selective Service Coordinator. Appellant was not informed of the inclusion of this "additional information" until after the Appeal Board on November 5, 1943, approved the reclassification of appellant. [R. 9.] Appellant later discovered that the "additional information" comprised three so-called statements of personal privilege filed by three members of the Local Board. [R. 84-95.] On November 12, 1943, the State Director of Selective Service approved the action of the Local Board and directed that appellant be ordered to report for induction, notwithstanding appellant's request to submit for consideration a report of an investigation of certain material facts then being made. Said report [R. 19-49] was later submitted to the State Director of Selective Service in support of appellant's request for a further deferment [R. 10], but a further deferment was denied.

Appellant was inducted into the armed forces of the United States December 2, 1943. [R. 2-3, 16.] His amended petition for a writ of habeas corpus was filed December 16, 1943. [R. 49.] The writ was issued, returnable December 29, 1943 [R. 50-52], on which day,

appellee having filed his return [R. 53], and the parties having stipulated that the amended petition should constitute a traverse to the return [R. 55], the matter was heard. The entire record of the Local Board was received in evidence as Petitioner's Exhibit 1 [see R. 56-98 for part of this Exhibit], the matter was argued, and on December 30, 1943, the District Court handed down an oral decision [R. 100] and ordered the writ discharged, the proceedings dismissed and the appellant remanded to the authority and control of the military authorities. [R. 112.] The final order from which this appeal is taken was filed March 29, 1944. [R. 113-114.]

The questions involved are (1) whether the appellant's reclassification in Class I-A instead of Class II-C, and his consequent induction into the military service, violated the provisions of the Selective Service and Training Act of 1940, as amended November 13, 1942; (2) whether the reclassification of petitioner was supported by any substantial and competent evidence; (3) whether the officials of the Selective Service system acted in an arbitrary, unfair and capricious manner in reclassifying appellant and in causing his induction into the military service; (4) whether, in so reclassifying appellant, the Local Board exceeded its authority; and (5) whether appellant has been denied due process of law.

Specification of Errors Relied Upon.

I.

The District Court erred in quashing the Writ of Habeas Corpus and dismissing the proceedings for the following reasons [R. 119-121]:

1. The order of induction is void and illegal in that it was made in violation of section 5, subdivision (k), Selective Service and Training Act (added Nov. 13, 1942, U. S. C. A., Tit. War, Appdx. sec. 305).

2. The reclassification of appellant in Class I-A instead of in Class II-C and said order of induction are not founded on and not supported by any substantial and competent evidence.

3. The reclassification of appellant in Class I-A instead of in Class II-C and the order of induction were made and issued by said Local Board as the result of an arbitrary, unfair, and capricious enforcement and administration of said Act, in that: (a) there is no substantial and competent evidence before the Board to support said reclassification and order; (b) said reclassification and order were made in disregard of all the evidence submitted by appellant to said Board in support of his application to be again classified in Class II-C; (c) appellant was not accorded a full and fair hearing before said Board; (d) said reclassification in Class I-A was based in part upon matters appearing in the record which appellant was not given an opportunity to rebut; and (e) said reclassification and order for induction were approved by Col. Kenneth H. Leitch, State Director of Selective Service, acting in an arbitrary, unfair, and capricious manner in the enforcement and administration of said Act.

4. In reclassifying appellant in Class I-A instead of in Class II-C, and in issuing said order of induction, said Local Board abused its discretion and exceeded its authority in the particulars immediately hereinabove set forth in subparagraph 3 of this paragraph.

5. By said classification in Class I-A instead of in Class II-C, and by said order of induction, appellant has been and is denied due process of law as guaranteed him by the 5th Amendment of the Constitution.

II.

The District Court, in its oral decision, erred in holding that when a registrant under the Selective Service and Training Act of 1940, as amended, has perfected an appeal to the appeal board, the only thing before the Court for consideration on the habeas corpus proceeding is the action of the appeal board, that action having superseded the action of the local selective service board.

III.

The District Court, in its oral decision, erred in holding that the local selective service board fully complied with section 627.13 of the Selective Service Regulations, requiring such Board to prepare and place in the file of the registrant a written summary of all facts considered by the Local Board which do not appear in the written information in the file.

IV.

The District Court, in its oral decision, erred in holding that, in proceedings to reclassify a registrant already classified in Class II-C, the local selective service board or the appeal board may reconsider matters of evidence or other matters of record already considered in so classifying the registrant.

ARGUMENT.

I.

The District Court Erred in Quashing the Writ, Dismissing the Proceedings and Remanding Appellant.

Appellant contends that the District Court erred in quashing the writ, dismissing the proceedings and remanding appellant to the custody of the military authorities for the reasons:

1. That the reclassification of appellant and the order for induction were void and illegal in that they were in violation of the statute;

2. That appellant's reclassification was not supported by any substantial and competent evidence;

3. That the Selective Service officials acted in an arbitrary, unfair and capricious manner, disregarded the evidence submitted by appellant, and considered statements which appellant was not given an opportunity to rebut;

4. That the Local Board abused its discretion and exceeded its authority; and

5. That appellant has been denied due process of law.

1. Appellant's Reclassification Was in Violation of the Statute and the Selective Service Regulations.

Subdivision (k) of section 5 of the Selective Service and Training Act of 1940, added November 13, 1942 (Ch. 638, 56 Stats. 1018; 50 U. S. C. A. Tit. War, Appdx. sec. 305), hereinafter referred to for convenience as the Act, provides in part as follows [see R. 102]:

> "(k) Every registrant found by a selective service local board, subject to appeal in accordance with section 10 (a) (2), to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, shall be deferred from training and service in the land and naval forces so long as he remains so engaged and until such time as a satisfactory replacement can be obtained; . . ."

At the time of the action of the Local Board here under review the Selective Service Regulations [see R. 102] provided in part as follows:

> "622.52. Class II-C: Man deferred by reason of his agricultural occupation or endeavor. (a) In Class II-C shall be placed any registrant who is found to be necessary to and regularly engaged in an agricultural endeavor essential to the war effort.
>
> (b) A registrant placed in Class II-C shall be retained in that class so long as he is necessary to and regularly engaged in an agricultural occupation or an agricultural endeavor essential to the war effort and until a satisfactory replacement in such agricultural occupation or agricultural endeavor can be obtained . . ."

At the same time, section 622.24 of the Regulations defined a "necessary man":

> "622.24. A registrant shall be considered a 'necessary man' in agricultural pursuit . . . only when all of these conditions exist: (1) He is, but for seasonal or temporary interruption would be, engaged in such activity; (2) he cannot be replaced because of a shortage of persons with his qualifications or skill in such activity; and (3) his removal would cause a serious loss of effectiveness in such activity."

While we agree with the court below, that, in order to secure deferment under this provision of the Act, a registrant must be found by the Local Board to be both necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort [R. 102], we submit that the Local Board disregarded all the affirmative evidence showing that this was the case, and that there was no substantial evidence before it to support its decision to the contrary, and that consequently its action was contrary to the statute. We shall discuss the evidence at length hereafter.

It is further submitted that the Local Board violated both the Act and the Regulations in not retaining appellant in Class II-C when his classification was reconsidered in 1943. Not only did the evidence show that he was still necessary to and regularly engaged in an agricultural occupation or endeavor, but there is no evidence in the record to show that "a satisfactory replacement" could be obtained, and the Local Board made no finding that such a replacement could be obtained.

The Selective Service Regulations have the force of law and must be followed by the Local Board.

United States v. Miller (D. C. 1918), 249 Fed. 985.

In this instance the language of section 622.25 of the Regulations is virtually the same as that found in section 5, subd. (k) of the Act. In *Ex parte Stanziale,* 138 F. (2d) 312 (C. C. A. 3d), the Court said of another section of the Regulations:

> "The language used appears to be mandatory and we may assume, for the purpose of examining the point here, that if a Local Board violates the provisions of one of the regulations laid down for its guidance, the person affected by the violation may have court relief."

So here, where the language of the Act and of the Regulations is mandatory, and the Local Board, in disregard of the evidence, violated both the Act and the Regulations, appellant was and is entitled to relief by the court.

2. The Decision of the Local Board Was Not Supported by Any Substantial or Competent Evidence.

It is conceded that the final decision as to appellant's right to exemption rests with the agencies created by the President under the Act, subject to review by the courts under certain well-defined rules.

United States v. Grieme, 128 F. (2d) 811;

Arbitman v. Woodside, 258 Fed. 441 (C. C. A. 4).

The question here is whether there is *any* substantial evidence to sustain the action of the agencies involved,

U. S. ex rel. Errichetti v. Baird, 39 Fed. Supp. 388,

having in mind that the court may not substitute its own judgment for that of the Local and Appeal Boards.

In re Rogers, 47 Fed. Supp. 265;

U. S. ex rel. Cameron v. Embrey, 46 Fed. Supp. 916.

In *Ex parte Stanziale,* 138 F. (2d) 312 (C. C. A. 3), the court said:

> "It is also clear that a court's criterion must be something different from the 'substantial evidence' rule so familiar in administrative review . . . The test of whether a draft board's action may be attacked seems to shift from whether its findings are supported by substantial evidence to whether it received and considered what a particular registrant submitted."

Although we believe that this is too broad a statement of the rule considered in the light of all the decided cases, nevertheless we submit that even that decision is not authority for the proposition that the Local Board's decision can be made without any evidence to support it. It would seem that the correct rule is stated in the case of *Benesch v. Underwood,* 132 F. (2d) 430, quoted by the Government in its memorandum of points and authorities in the trial court:

> "The action of the Local Board, within the scope of its authority, is final and not subject to judicial review when the investigation by the Board has been

> fair and its findings are supported by substantial evidence; but if it is shown that the investigation has been unfair, or that the Board has abused its discretion by a finding contrary to all the substantial evidence, the courts are open for relief under the writ of habeas corpus, if the registrant has exhausted his administrative remedies under the Act."

Other decisions which support this view include:

U. S. ex rel. Broker v. Baird, 39 Fed. Supp. 392;

U. S. ex rel. Pasciuto v. Baird, 39 Fed. Supp. 411;

U. S. ex rel. Ursitti v. Baird, 39 Fed. Supp. 872;

Goodwin v. Rowe, 49 Fed. Supp. 703.

It is not questioned here that appellant exhausted his administrative remedies under the Act before seeking relief from the courts.

It is contended, however, that the findings of the Local Board are not supported by any substantial evidence, and that the Local Board abused its discretion by a finding contrary to all the substantial evidence.

The evidence offered to the Local Board by appellant is summarized in his written statement to the Board dated October 12, 1943. [R. 63-70.] The evidence consisted of appellant's affidavit in support of his claim for occupational deferment; thirty-one affidavits from appellant's neighbors and acquaintances; letters from the Governor and other residents of South Dakota, and certain letters from appellant to the Local Board dated September 11, 1943, September 17, 1943, September 18, 1943, and October 11, 1943. [See R. 13.] The originals of these documents are included in Petitioner's Exhibit 1, compris-

ing the entire record of the Local Board, and are now before the court. In part, at least, this evidence is corroborated by the report of the investigation made at the direction of the Governor of South Dakota under date of November 22, 1943, and submitted to the State Director of Selective Service while the matter was being considered by him. [R. 19-49.]

Other evidence in support of appellant's claim for deferment is to be found in three letters from one DeVelder, Chairman of the Douglas County, South Dakota, U. S. Department of Agriculture War Board, to Local Board No. 271, dated August 18, 1943, September 7, 1943, and October 4, 1943. [R. 56-62.] These letters were before the Local Board when it first reclassified appellant on September 11, 1943, although appellant was not aware of that fact at the time, and it was not until after his reclassification that day that appellant was given any opportunity to meet the adverse statements contained therein.

From the DeVelder letters it appears affirmatively that appellant owned a substantial amount of land in South Dakota, a large part of it being rented out to tenants on a share basis [R. 56]; that on a farm consisting of 569 acres, of which appellant took possession in March, 1942, operated by appellant and not by tenants, 343 acres were in crop land and the remainder in hay and pasture land; that on the crop land, appellant had planted 275 acres of corn and 68 acres of small grain during the farming season of 1943; and that he had hired three hands to work on his farm during the 1943 planting season [R. 57]; and that as of January 1, 1943, appellant maintained on his farm 68 head of cattle, 80 pigs, 150 hens and 3 brood sows. [R. 57.]

These letters were written by DeVelder in response to inquiries made on behalf of the Local Board by the Chairman [see R. 56, 58] pursuant to the authority found in Selective Service Regulations, section 621.7, by which [see R. 103]:

> "(a) The local board is authorized to request and receive information from local welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant."

The agency here involved, the U. S. D. A. War Board for South Dakota, or Defense Board as it was first called, was established by "Memorandum No. 921" dated July 5, 1941, issued by the Secretary of Agriculture. It is not questioned that the U. S. D. A. War Board in South Dakota was an appropriate governmental agency within the meaning of section 621.7 of the Selective Service Regulations, and it is therefore considered unnecessary to examine here the authority by which they were created.

When the DeVelder letters were written, the Local Board was under instructions to give consideration to the number of "war-units" produced on a given farm which could be "directly attributed" to the efforts of the registrant. These instructions to the Local Board are found in Local Board Release No. 164 signed by the National Director of Selective Service, dated November 17, 1942, as amended by Local Board Releases Nos. 168 and 175, dated November 30, 1942, and January 16, 1943, all supplementing section 622.25 of the Regulations. The material portions of these Local Board Releases and of Local Board Releases 164-A (March 5, 1943), appear in the appendix to this brief. (Appendix A.) From these re-

leases it appears that "a national objective has been declared to be the production by as many farmers as possible of 16 or more war units" (L. B. R. 164, par. 9), and the Local Boards were required to give consideration to the standards so fixed, although admittedly the standard was not rigid. (L. B. R. 164, par. 10.) Measured by the tables furnished to the Local Boards by the Director in these Local Board Releases computed on the basis of the figures found in DeVelder's first letter of August 18, 1943, which we have quoted above [R. 56], appellant here is shown to have been responsible for the production of some 72.81 "war units," made up as follows: 68 head of cattle, 6.80 units; 80 pigs, 2.40 units; 150 hens, 1.95 units; 3 sows, 1.00 unit; 275 acres of corn, 55 units; 68 acres small grain, 4.76 units. This factor seems to have been entirely overlooked by the Local Board, except as it may have concluded that this production could not be "directly attributed" to the efforts of appellant.

There was no evidence before the Local Board from which it could find or conclude that the production on his farms could not be directly attributed to appellant, and that he was not necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort within the meaning of the Act and the Regulations. When appellant's case came up for consideration in July, 1943, he was already in Class II-C, and there was no evidence before the Local Board to show that he was no longer engaged in an essential agricultural occupation or endeavor or that a satisfactory replacement could be obtained as required by the Act and by the Regulations.

The remainder of the evidence can be discussed more appropriately when considering the arbitrary and capricious nature of the action of the Local Board.

3. The Local Board Acted in an Arbitrary, Unfair and Capricious Manner.

It is contended that the trial court erred in holding that the Local Board, in reclassifying appellant, did not act in an unfair, arbitrary and capricious manner, in that it disregarded the evidence submitted by appellant, and considered statements of which appellant was not informed and which he did not have an opportunity to rebut.

We believe it will be conceded that appellant is entitled to the relief which he seeks if it can be shown that the Local Board as well as the Appeal Board and other Selective Service officials acted in an arbitrary, unfair or capricious manner in reclassifying him.

United States v. Grieme, 128 F. (2d) 811 (C. C. A.);

United States ex rel. Mauro v. Downer, 50 Fed. Supp. 412;

In re Rogers, 47 Fed. Supp. 265;

Benesch v. Underwood, 132 F. (2d) 430 (C. C. A.);

Checinski v. United States, 129 F. (2d) 461 (C. C. A.);

Ex parte Stewart, 47 Fed. Supp. 410 (D. C., Cal.).

In *Johnson v. United States,* 126 F. (2d) 242 (C. C. A. 8), the court said:

> "The courts have no power to classify registrants —that is solely for the agencies created by or under the authority of Congress. But classification by such agencies must, under the powers given them by Congress, be honestly made, and a classification made in

the teeth of all the substantial evidence before such agency is not honest but arbitrary. Courts can prevent arbitrary action of such agencies from being effective."

The phrase, "arbitrary and capricious," is defined in *In re Rogers, supra,* where it was said by the court:

"The petitioner charges that the two Boards 'acted arbitrarily and capriciously.' The general meaning of that particular phrase is 'without any reasonable cause, without cause based upon the law; without reason given; in disregard of evidence. It is comparable to, without justification or excuse; with no substantial evidence to support it; a conclusion contrary to substantial, competent evidence.'

"The court may not substitute its judgment for that of a duly constituted executive agency. If the finding of the agency is supported by testimony, then the finding will usually stand and may not be said to be 'arbitrary and capricious.' The rule is not changed by the fact that the nation is at war."

While it is admitted that the courts cannot review the action of the Local Board or Appeal Board on the merits, or substitute its judgment for theirs, nevertheless, all the evidence must be considered from the standpoint of whether their decision was arbitrary and capricious and not founded on substantial evidence.

United States ex rel. Cameron v. Embry, 46 Fed. Supp. 916.

(a) *The DeVelder Correspondence.*

We submit that the action of the Local Board and of the Appeal Board was arbitrary and capricious within the meaning of the rules stated above. The only possible support which their action can have is to be found in certain portions of the DeVelder letters other than those portions to which we have already referred.

The DeVelder correspondence was initiated by the letter from the Chairman of the Local Board of August 12, 1943, which was acknowledged by DeVelder on August 18, 1943. [R. 56.] Before considering this correspondence in detail it should be noted that while it was quite proper, under the Regulations to seek the information from the War Board, and while the Local Board was not obligated to make this inquiry or to make a search for evidence beyond what was presented by the appellant (*cf. Rase v. United States,* 129 F. (2d) 204, 209), it would seem that it once undertook to do so, it should have completed its investigation before acting. We shall point out shortly wherein it failed to complete the investigation which it had started. Furthermore, it should be pointed out that it was decidedly irregular on the part of the Local Board to place this correspondence in appellant's file and to consider it in making its decision adverse to him on September 11, 1943, without advising appellant of the existence of the letters. (See *United States v. Kowal,* 45 Fed. Supp. 301.)

In DeVelder's first letter of August 18, 1943, he states [R. 57]: "That at no time during the past two years has Mr. Cramer personally done any farm work whatever himself. That at no time has Mr. Cramer displayed any knowledge of farming which would qualify him to supervise the hired men doing the work on such farm." These statements are patently nothing more than bald conclusions of the writer, not based on any facts within his personal knowledge nor even on observation, so far as the letter shows, and are not evidence, either substantial or otherwise, within the meaning of that term. It may be, as the trial court remarked in handing down his decision [R. 103, 107] that "the boards are not held to the strict rules of evidence which are sometimes required to be followed in courts of law," but it is nowhere suggested or held that they may base their decisions on the opinions or conclusions of others not supported by some sort of evidence of the underlying facts. All the cases which we have examined, including those cited above, hold that the decisions of the Local Board and Appeal Board *must be based on evidence;* no case holds otherwise.

Upon receipt of DeVelder's first letter, the Chairman of the Local Board wrote him of the receipt of several affidavits submitted by appellant, saying [R. 59]: "Each of these nine affidavits attest to the fact that Mr. Cramer has been working in the field, doing all kinds of farm work personally, and driving a tractor, and the affiants say under oath they witnessed Mr. Cramer in person so engaged. We are also in receipt of photostatic copies of a certificate of Farm War Service, and a letter dated June 1, 1943, mailed to Mr. Cramer." He then asks DeVelder: "What explanation can be offered for the reason nine

persons state they have seen Mr. Cramer doing the farm work himself, and yet we have a statement [from you] saying that Mr. Cramer has never undertaken to do any work whatsoever."

DeVelder's reply to this inquiry is dated September 7, 1943. [R. 60.] The pertinent portions of that reply are as follows:

> "I am not authorized to enter into controversies as to facts nor do I feel justified in attempting to disprove anything which may be contained in affidavits procured by the registrant and filed with you. [R. 60.] As previously stated, I am not in a position to enter into any controversy as to whether the statements I have made are truthful facts or not but if you wish to find out for yourselves I would suggest that you write Mr. Cramer's neighbors, and I accordingly herewith submit a list of neighbors living within one and one-half miles of him. [R. 61.]"

We remarked above on the obvious duty of the Local Board to complete an investigation once undertaken, in fairness to the registrant. It is highly significant that the Local Board did not follow DeVelder's suggestion, in view of their expressed desire to have someone "throw some light on the situation." It is equally significant that DeVelder "hedged" as he did when confronted with a statement of the facts, after having said in his first letter [R. 57] that he would "be pleased to give you any further available information which you may require." Furthermore, it is significant to note from DeVelder's second letter his statements as to the business relations between appellant and the affiants named; certainly such relationships gave them ample opportunity to observe appellant's

activities as a farmer, and consequently add considerable weight to the straightforward statements made in their affidavits. On the other hand it does not appear that DeVelder's conclusions were based on such observations. The net result of this correspondence was to leave the Local Board on September 11, when it first reclassified appellant, with no evidence before it in support of DeVelder's conclusions or to refute the positive statements in the affidavits and letters submitted by appellant in support of his position. The originals of the several affidavits referred to by the Chairman of the Local Board in his letter to DeVelder are included in Petitioner's Exhibit 1 now before the court.

It is apparent from the Chairman's letter to DeVelder of September 3, 1943, that DeVelder's letter of August 18, 1943, did not contain any information or constitute "evidence" upon which the Local Board might fairly base the decision it made. Nevertheless, the Chairman seems to have reached a conclusion that day on the basis of that letter to which he apparently adhered throughout the proceeding. This is evidenced by his letter of the same day, September 3, 1943, to the secretary of the Local Board in which he said [R. 6]:

> "I am returning to you the bulletin issued by the United States Department of Agriculture. Unless there is information in the affidavits to which you called attention over the phone a few minutes ago, it appears to me that the information given in Section 2 on the first page of the bulletin coupled with the letter from South Dakota Draft (*sic*) Board, makes it almost mandatory for our Board to classify Mr. Cramer I-A. Particularly is this true when we read the checkmarked paragraph 2 on page 3 which speci-

fies that war boards should be in a position to initiate requests for 2-C or 3-C classifications of registrants in agricultural occupations. Cramer's War Board apparently has no thought whatsoever of making any such suggestion in his behalf."

The bulletin to which the Chairman here referred, together with his letter are part of Petitioner's Exhibit 1, now before the court. The bulletin, designated WL310, LBR 48, was dated March 20, 1943, and issued by the California U. S. D. A. War Board, and appears in full in the appendix to this brief (Appendix B). The portions to which the Chairman referred in his letter to the secretary read as follows [see R. 7]:

Page 1, section 2:

"It is the responsibility of local draft boards to refer to county war boards the names and addresses of persons engaged in agricultural occupations or endeavor, where there is a question as to whether or not such person would qualify for classification in II-C or III-C. Therefore steps should be taken to work out a mutually agreeable arrangement for the handling of this procedure. It is suggested that each county war board contact local Selective Service Boards and, if possible, arrange a joint meeting to discuss matters of procedure and policy at the county level or local board level in connection with Selective Service Local Board Release No. 164-A."

Page 3, paragraph 2:

"War Boards should also be in a position to initiate requests for the classification of agricultural registrants in II-C and III-C even though neither the registrant of his employer has requested deferment."

Before considering further the arbitrary and capricious manner in which the Local Board acted on the DeVelder correspondence in the light of the Regulations and directives referred to, it may be observed that when the matter was finally disposed of on October 12, 1943, while no additional inquiry had been made by the Board of DeVelder or of anyone else, nevertheless DeVelder and his associates on the South Dakota War Board on October 4, 1943, reported that "after carefully investigating and checking his records" it had found "that in our opinion Mr. Nelson Baker Cramer is not essential to the operation of his farm." [R. 62.] This statement, of course, was wholly gratuitous and not based on any facts so far as the record shows, and is of no value as evidence since it does not appear what investigation was made or what records were checked.

As already pointed out, section 621.7 of the Regulations provides [see R. 103]:

> "(a) The local board is authorized to request and receive information from local welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant."

It is obvious that DeVelder's first letter of August 18, 1943 [R. 56], did not assist the Local Board, else it would not have been necessary for the Chairman, by his letter of September 3, 1943 [R. 58], to ask DeVelder to "clarify certain statements which seem to conflict," and to "throw some light on the situation." It is equally obvious, as we have said, from the Chairman's letter of the same day to the secretary of the Local Board that the Chairman had made up his mind that it was "almost mandatory for our

board to classify Mr. Cramer I-A," in view of the De-Velder letter and the bulletin from the U. S. D. A. War Board. [R. 6.] The fallacy in the Chairman's position thus taken, which resulted in his joining later in the arbitrary and capricious action of the board itself, lies in the fact that he did not consider paragraph 6 of the bulletin to which he referred, assuming that he had read it; had he done so he could not have honestly reached the conclusion that the bulletin made it "almost mandatory" to classify appellant in Class I-A. Paragraph 6 of that bulletin reads as follows:

> "6. Since war boards have only the one job of obtaining needed agricultural production, *it should not be their responsibility to report their opinions as to whether or not an individual may be a draft dodger.* County war boards are to report the actual status of the individual engaged in agricultural work, outlining the actual production that this individual is responsible for. *The final decision with regard to whether or not an individual shall be inducted into the armed services rests with the local draft board or the appeal board, as the case may be.*" (Italics ours.)

In other words, neither the bulletin from the War Board nor the letter from the South Dakota War Board, nor any other like matter before the Local Board, made it mandatory or "almost mandatory" to reclassify appellant. That responsibility was affirmatively left with the Local Board which, as we have seen was required to act only on the basis of substantial and competent evidence.

To what extent the individual opinion of the Chairman as so expressed in his letter of September 3 to the secre-

tary carried weight with the other two members of the Local Board who reclassified appellant by their majority vote on September 11, we do not know. However, it is clear that the majority of the Local Board was still acting in an arbitrary and capricious manner and in disregard of the evidence on October 12, 1943, when they again reclassified appellant; this is apparent from the minutes of that meeting, the original of which is now before the court as part of Petitioner's Exhibit 1. The pertinent portion of those minutes is set forth in the petition. [R. 8.] Those minutes include the following entries:

> "Mr. Cramer was advised that the board was required to follow instructions laid down in a directive from the U. S. Department of Agriculture County War Board, dated March 20, 1943, which in part reads: 'It is the responsibility of Local boards to refer to county war boards the names and addresses of persons engaged in agricultural occupations or endeavor, where there is a question as to whether or not such person would qualify for classification of II-C or III-C.'"

They also include the statement that the County War Board in South Dakota had:

> "advised in writing they did not believe Mr. Cramer was entitled to deferment."

It is evident from this that on October 12, 1943, the Local Board, or at least the majority of three who took the action above referred to, was acting on the basis of the supposed mandatory character of a part of the directive from the U. S. D. A. War Board as requiring them to classify appellant I-A. In so acting they disregarded the evidence submitted to them by appellant and based

their decision on no evidence at all, thereby disregarding the plain mandate of the Act, the Regulations and even the bulletin in question, which required the Local Board to make the final decision on substantial and competent evidence. Such action on the part of the Local Board was unfair, arbitrary and capricious, and should not be allowed to stand.

As said in *United States ex rel. Feld v. Bullard,* 290 Fed. 704 (C. C. A., cert. den. 262 U. S. 760), the facts which bring a registrant within an exempted class under the Act must, of course, be affirmatively proved. Here the facts were affirmatively proved by the affidavits and by appellant's own statement submitted to the Local Board. As the Chairman of the Board said in writing to DeVelder on September 3, 1943 [R. 59], nine of the affidavits then in hand attested to the fact that the affiants had personally seen appellant "doing all kinds of farm work personally," and there is no evidence in the record to the contrary.

It was said recently in *United States ex rel. Phillips v. Downer,* 135 F. (2d) 521:

> "We made it clear in the Kauten case [*U. S. v. Kauten,* 133 F. (2d) 703] that the courts cannot act as appellate tribunals for the draft machinery, and that the weight of the evidence is a matter for the draft boards. Nevertheless, it has been considered settled under both the Draft Act of 1917 and the present Act that errors of law are to be rectified by the courts. The various authorities are collected and analyzed in *United States v. Grieme,* 3 Cir., 128 F. (2d) 811. We think, therefore, that the writ should be sustained."

So here, appellant does not ask the court to act as an appellate tribunal for the draft machinery, and agrees that the weight of the evidence is a matter for the Local Board to determine. But when, as here, the Local Board arbitrarily and capriciously makes a decision patently without any evidence to support it, there has been a substantial error of law which should be corrected by the courts.

(b) *The Statements of Personal Privilege.*

In so far as the action of the Appeal Board is subject to review here within the rules stated, for the correction of substantial errors of law, it is contended by appellant that the Appeal Board had before it erroneously, and erroneously and arbitrarily considered as a part of the file sent up by the Local Board three so-called statements of personal privilege placed in the file by the three members of the Local Board constituting the majority after their decision had been made, without advising appellant that this had been done, and without giving appellant an opportunity to meet any of the statements contained therein. We shall consider these statements hereafter in our discussion of the third specification of error. The matter is referred to here as constituting further evidence of the unfair, arbitrary and capricious action of the Local Board and of the Appeal Board.

4. *The Local Board Abused Its Discretion and Exceeded Its Authority.*

The manner in which the Local Board abused its discretion and exceeded its authority is fully discussed in the portion of our argument just concluded with respect to the absence of any evidence to sustain its action and with respect to its acceptance of the unsupported opinions and conclusions of DeVelder and the South Dakota War Board. The law and the regulations required the Local Board to make the final decision on the evidence before it. As we have pointed out, the Local Board blindly accepted the purported decision of another agency which, according to the minutes of the Local Board, but not according to the facts, had allegedly "advised in writing they did not believe Mr. Cramer was entitled to deferment." [R. 8.]

The discretion and authority to determine whether a registrant should be exempted or deferred is reposed by the Act and the Regulations only in President and the Boards created by him for the purpose of administering the Act, that is, the Local Board and the Appeal Board.

> *United States v. Grieme,* 128 F. (2d) 811 (C. C. A. 3).

It is apparent that the Local Board abused its discretion in virtually delegating its authority to the War Board in South Dakota and, in so far as the record shows, in failing to complete the investigation it had started, and to exercise its discretion and reach its own conclusion on the facts before it. Such an abuse of discretion should be corrected by the courts.

5. *Appellant Has Been Denied Due Process of Law.*

The contention that appellant was denied due process of law is predicated on the fact that he was denied a fair hearing as required by the Fifth Amendment to the Constitution.

It is axiomatic that a registrant is entitled to have the Local Board and the Appeal Board consider all the facts, and to exercise its discretion and make its decision in accordance with the Act and the regulations; a failure in these particulars is a denial of due process.

U. S. ex rel. Ursitti v. Baird, 39 Fed. Supp. 872;
U. S. ex rel. Broker v. Baird, 39 Fed Supp. 392;
Goodwin v. Rowe, 49 Fed. Supp. 703;
Rase v. United States, 129 Fed. (2d) 204.

The particulars in which the hearing before the Local Board and the Appeal Board were not fair, and in which the Boards acted in an arbitrary and capricious manner have been fully discussed, and it would serve no useful purpose to review the facts here.

It is submitted that the constitutional rights of appellant have been infringed, and that the courts should interfere with the action taken by the Local Board and that the writ should now be sustained.

United States v. Grieme, 128 Fd. (2d) 811 (C. C. A. 3);
Hauck v. Hoyl, 51 Fed. Supp. 1005.

II.

The Action of the Local Board Must Be Considered by the Court.

It is the contention of appellant that the District Court erred in holding that when a registrant under the Act has perfected an appeal from a Local Board to the Appeal Board, the only thing before the court for consideration on habeas corpus proceedings is the action of the Appeal Board, that action having superseded the action of the Local Board. [R. 120.]

In his oral decision the trial court said [R. 105]:

> "Now it has been my view, and I still adhere to that view, that when a registrant has perfected an appeal to the appeal board or caused the same to be perfected for him, that the only thing before me for consideration on the habeas corpus proceeding would ordinarily be the action of the appeal board, that having superseded the action of the local draft board. In this case, in order that the question may be decided without undue delay and in order that the record may be entirely before the Circuit Court of Appeals or the Supreme Court, in the event that those bodies are called upon to pass upon the question, I have permitted the record to go in and have given it very careful consideration on its merits, and the record is here so that he who wants may read, and the case may not be sent back for further trial, in all probability, on that point."

In view of the court's action in admitting the record of the Local Board and his statement that he had "given it very careful consideration on its merits," it might be

said that the contention of appellant involves only an academic or moot question. However, since the court was so emphatic in stating that it was his view, and that he adhered to the view, that when an appeal has been perfected the only thing before him for consideration "would ordinarily be the action of the appeal board," we must assume that the court's decision was based solely on his consideration of the action of the Appeal Board, regardless of the fact that he considered the record of the Local Board "on its merits." If our assumption is correct, it is necessary to consider the point briefly.

We believe that the only support for the position taken by the trial court is to be found in section 627.26 of the Regulations, quoted by the trial court in his oral decision [R. 104]:

> "627.26 (a) The board of appeal shall classify the registrant, giving consideration to each class in the order in which the local board gives consideration thereto when it classifies a registrant."

It is significant that no decisions were referred to by the trial court in support of his view that the action of the appeal board supersedes the action of the Local Board. The error in the trial court's view of the matter becomes apparent when it is considered that a registrant cannot seek relief in any case until he has exhausted his administrative remedies, including an appeal to the appeal board,

> *Rase v. United States,* 129 F. (2d) 204 (C. C. A. 6);
>
> *Johnson v. United States,* 126 F. (2d) 242, 247,

yet in every case in which relief has been sought, the courts have stated that it is the action of the *local board,*

rather than the action of the appeal board, at least in the first instance, which has been the subject of consideration. Thus, in *Benesch v. Underwood,* 132 F. (2d) 430 (C. C. A. 6), it is said:

> *"The action of the Local Board, within the scope of its authority, is final* and not subject to judicial review when the investigation by the Board has been fair and its findings are supported by substantial evidence; but if it is shown that the investigation has been unfair, or that the Board has abused its discretion by a finding contrary to all the substantial evidence, the courts are open for relief under habeas corpus, *if the registrant has exhausted his administrative remedies under the Act."* (Italics ours.)

It would serve no useful purpose to review here the many cases already cited, wherein similar language is to be found.

We have found no case which holds that the language of section 627.26 (a) of the Regulations is to be taken literally to mean that the classification of any registrant by an appeal board so far supersedes the action of the local board as to preclude, in habeas corpus proceedings, a consideration of the action of the local board. We find nothing in Part 627 of the Regulation or in any other part of the Regulations or the Act which sustains this proposition. Under these circumstances we submit that the decision of the trial court on this point is erroneous, and that in so far as his final order was based on this erroneous view of the law, this error was prejudicial to appellant.

III.

The Trial Court Erred in Its Holding as to the Filing of the Required Written Summary of Facts Not Appearing in the File.

It is contended by appellant that the trial court erred in holding that the Local Board fully complied with section 627.13 of the Regulations requiring the Board to prepare and place in the registrant's file a written summary of facts not otherwise appearing therein. [R. 121.]

Section 627.13 of the Regulations, as quoted by the trial court in his oral decision, reads [R. 103]:

> "627.13 . . . If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts. In preparing such a summary the local board should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision.."

On this point the trial court said [R. 106, 107]:

> "It is true that the law provides for a written summary to be sent by the local draft board to the appeal board of those facts which are not contained in the written record. In this case the registrant made the summary himself. Of course the law doesn't contemplate that the draft board shall do an unnecessary act, and three of the members of the draft board wrote what they called privileged communications, which denied, in part, some of the facts set forth in the summary. The contention of counsel for the registrant is that the registrant had a right to have

the file sent to the appeal board in the condition in which it was at the time that the summary was filed by the registrant, and he relies, to some extent, in that upon this case of U. S. v. Cole, in the District Court of Delaware. The findings of the Court there I believe to be *obiter dicta.* I am not sure that I agree with the decision even under the circumstances indicated in the opinion, but, even so, I do not feel that it is applicable here. It seems to me that the applicant should have known that when he made such serious charges as he did in what he described as his summary, that some, at least of the members of the board would not take it lying down, and that they would feel that they should at least file a formal denial. That is a part and parcel, as I consider it, of the summary which the law contemplated.

Now we must look through form to substance in all of these things. Naturally these lay boards—the local draft boards, and sometimes the lay members of the appeal boards—are not technical lawyers. They are not required to respond to precedents and the rules of evidence as do the formal courts. Seldom do administrative bodies consider themselves bound by those technical requirements which are recognized in formal courts of law. Taking it by and large I think that the summary prepared by the registrant and the statements of the three members of the board may, together, fairly be considered to be the summary which the law contemplated."

The facts to which this part of the court's decision relate are undisputed. On October 12, 1943, appellant appeared before the Local Board, and after reading a prepared statement [R. 63-70], submitted to examination by members of the board. On October 18, 1943, pursuant

to section 625.2 (b) of the Regulations, appellant filed with the Local Board his summary of what was said when he so appeared. [R. 70-84.] Before the record was sent to the Appeal Board three members of the Local Board prepared and placed in appellant's file their individual so-called statements of personal privilege. [R. 84-98.]

The error in the trial court's view of this matter is to be found in his statement, quoted above [R. 107]. "Taking it by and large I think that the summary prepared by the registrant and the statements of the three members of the board may, together, fairly be considered to be the summary which the law contemplated." It is submitted that these documents could not be so considered, fairly or otherwise. Quite aside from their content, and quite aside from the question of whether the three members of the board mentioned in appellant's statement had the right, as the trial court suggested, to "at least file a formal denial," the individual statements of these three of the five members of Local Board, obviously prepared and filed at different times, could not be considered, even in conjunction with appellant's statement, as the summary which the law contemplated.

At the time here involved, section 627.13 of the Regulations required that *the Local Board* should prepare the summary; it did not contemplate that the summary should consist of one or more statements of personal privilege prepared and filed by individual members of the board, or any statement or "summary" filed by a registrant pursuant to another provision of the Regulations. The Regulations also required that the summary should "avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any

argument in support of its decision." It is submitted that, individually and collectively, the three statements in question violate this injunction, in that they contain several expressions of opinions as well as arguments in support of the board's decision. Furthermore, the three statements were admittedly made for the purpose of refuting appellant's charges, and it is obvious that the writers did not intend them to be, nor can they be considered, as a summary of any facts considered by the Local Board which did not, at the time, appear in the written information in the file.

The Regulation contemplates that, in preparing the summary, all five members of the Local Board should act *collectively* in their official capacity; had they done so, their act would carry with it the presumption of validity which usually attaches to official acts of such agencies.

> *Leuer v. McIntyre,* ..... Tex. Civ. App. ....., 162 S. W. (2d) 158 (1942).

The law does not contemplate that the acts of the individual members of the Local Board shall be binding in any way upon the registrant, and it is those individual acts which are here attacked. As the court said in the case just cited:

> "Any act done by individual members of the Board in their private capacity towards fixing plaintiff's status as a drafted man would of course be a nullity, without power to enforce, and nobody need pay any attention to them. But any act done by them collectively, in their official capacity, is a very different thing, and carries with it the usual presumption of validity incident to official acts of governmental agencies."

As we have already pointed in another connection, the language of the Regulation is mandatory, and when it appears, as it does here that a Local Board violates the provisions of a regulation laid down for its guidance, the person affected thereby may have court relief.

Ex parte Stanziale, 138 F. (2d) 312 (C. C. A. 3).

In our discussion of the first assignment of error we stated we would discuss at a later point the contention that the reclassification of appellant was the result of the arbitrary, unfair and capricious enforcement of the Act, in that, in part, "(d) said reclassification in Class I-A was based in part upon matters appearing in the record which appellant was not given an opportunity to rebut" [R. 120]. These statements of personal privilege are the matters there referred to.

The record shows that appellant was finally reclassified by the local board October 12, 1943, and that appellant's notice of appeal was filed October 18, on which day he also filed his summary of the events of October 12 which provoked the statements in question [see R. 8-9, and original records of local board, Petitioner's Exhibit 1, now before this court]. The three statements of personal privilege are dated October 20 and 21 and November 1, 1943, respectively [R. 84, 88, 96].

It is submitted that appellant had the right to assume that no additional matters would be placed in the file before it was transmitted to the appeal board, except the summary contemplated by section 627.13 of the Regulations. In any event, he had no notice of the filing of the three statements, nor any opportunity to rebut them. It is submitted that their inclusion in the file and their con-

sideration by the appeal board was prejudicial to appellant's rights, and that the trial court erred in holding otherwise.

We have already pointed out that the trial court held that "the summary prepared by the registrant and the statements of the three members of the board may, together, fairly be considered to be the summary which the law contemplated" [R. 107]. Almost immediately thereafter, in meeting appellant's contention that the inclusion of these letters in the record was prejudicial to his rights, the trial court held that they were not prejudicial, and that in any event the appeal board would quickly consider them as "chaff":

> "The contention is made that certain letters sent up to them by the local board were prejudicial. I don't think they would be considered prejudicial in a court such as this, and I don't believe that the appeal board would be prejudiced by them. I think the appeal board would very quickly separate the wheat from the chaff and would take out of it what they properly might, without being too technical" [R. 108-109].

We fail to see how, at one moment, the appeal board must treat such documents as a part of summary which the local board is required to file and, which, perforce, must be given every consideration in its entirety, while, at the next, the appeal board is expected to separate those documents from the rest of the record as it would separate chaff from wheat, in order to avoid being prejudiced thereby. We respectfully submit that, in this particular case, the trial court reached inconsistent conclusions with respect to the documents in question, both of which are erroneous, and that the errors thus committed were prejudicial to the rights of appellant.

IV.

The Trial Court Erred in Holding That the Local Board Might Consider Certain Matters Relating to Their previous Classification of Appellant.

This assignment of error relates to the views of the trial court as to those matters once considered by a local board in classifying a registrant which may be reconsidered by the board in determining whether he should be reclassified, as stated by the trial court in his oral decision [R. 109-110].

Except as to the one matter, immediately hereinafter noted, included in this portion of the trial court's decision, it is now believed that the point is not well taken and this assignment of error is abandoned.

V.

The Trial Court Erred in Holding That the Local Board Could Consider the Requirement for Manpower.

It is contended that the trial court erred in holding that, in reclassifying a registrant the local board must take into consideration the requirements for manpower in various categories [R. 121].

With reference to manpower requirements, the trial court said in his oral decision [R. 110]:

> "They [the local boards] have certain quotas that are necessary to be raised, and while the regulations provide that that shall not influence their judgment, they have to take into consideration, in determining who are necessary for what, the requirement for manpower in the various categories; and I presume that that is only natural."

The law provides that "The selection of men for training and service under section 3 (other than those who are voluntarily inducted pursuant to this Act) shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the men who are liable for such training and service and who at the time of selection are registered and classified but not deferred or exempted", and that quotas of men to be inducted are to be determined as set forth in the Act and in accordance with the regulations. (Selective Service and Training Act, Sec. 4.)

When the local board considered this case on October 12, 1943, section 623.2 of the Regulations provided that "The registrant's classification shall be made *solely* on the basis" of questionnaires referred to in the section, "and such other written information as may be contained in the file." In thus expressly limiting the factors that are to be considered by the board, all other factors are expressly excluded. While the Regulations do not expressly provide, as the trial court puts it, that the quotas to be raised are not to influence the board's judgment in classifying a registrant, the Regulations and the Act contemplate that classification of registrants is to be completed before any men are selected to fill a call (see Part 632), and that neither quotas, manpower requirements, nor any factors other than those expressly referred to are to be considered in making such classifications, and that this is particularly so in the cases of those engaged in agricultural occupations or endeavors essential to the war effort. Thus, paragraph 8 of Local Board Release 164-A (see Appendix A), expressly and unequivocally states:

> "Having made its determination that an individual registrant is necessary to and regularly engaged in

an agricultural occupation or endeavor essential to the war effort, the local board has no further discretion and must defer the registrant. No desire to meet calls for manpower should in any manner influence the local board's decision. Calls which cannot be met without taking registrants considered necessary to and regularly engaged in agricultural occupations or endeavors essential to the war effort should be left unfilled."

The trial court was accordingly in error in holding that the board had "to take into consideration, in determining who are necessary for what, the requirement for manpower in the various categories." This error was prejudicial to appellant.

Conclusion.

The case is here on appeal from a judgment of the District Court quashing the writ of habeas corpus issued on appellant's petition, dismissing the proceedings and remanding the appellant to the military authorities. The purpose of the proceeding is to determine the validity of the induction of appellant into the armed forces of the United States pursuant to the Selective Service and Training Act of 1940, as amended. The question involved is this, whether appellant, having formerly been classified in Class II-C, as being a necessary man regularly engaged in an agricultural occupation or endeavor essential to the war effort, was properly reclassified in Class I-A, as being immediately available for military service.

It is conceded that the court may not substitute its judgment for that of the local and appeal boards. However, relief must be granted if it is shown, as we contend that it has been shown, that the reclassification and conse-

quent order for appellant's induction violated the Act; that the reclassification was not founded on nor supported by any substantial and competent evidence; that the reclassification was the result of the arbitrary, unfair and capricious enforcement and administration of the Act by the local and appeal boards; that those boards abused their discretion and exceeded their authority; and that appellant was and is thereby denied due process of law as guaranteed to him by the 5th Amendment to the Constitution.

The trial court found that these contentions were not sustained by appellant. Appellant contends that the judgment of the trial court was erroneous in all these particulars and should be reversed. It is contended further that in reaching his conclusions the trial court committed the other errors assigned and discussed herein by reason whereof the judgment of the trial court should be reversed.

Respectfully submitted,

PHILBRICK MCCOY,

Attorney for Appellant.

APPENDIX A.

622.25

National Headquarters
Selective Service System
Washington, D. C.

November 17, 1942

As amended by:
LBR No. 168, 11-30-42
LBR No. 175, 1-16-43

Local Board Release No. 164

Effective January 16, 1943

Subject: Classification of Registrants in Agriculture

Part I

1. Amendment to Selective Service Act.—Congress has amended section 5 of the Selective Service Act by the addition of a new subsection (k) which provides for the deferment of every registrant found by a local board (subject to the right to appeal to a board of appeal) to be necessary to and regularly engaged in an agricultural occupation or agricultural endeavor essential to the war effort so long as he remains so engaged and until such time as a satisfactory replacement can be obtained. It further provides, that should any such registrant leave such occupation or endeavor, the local board shall reclassify such registrant in a class immediately available for military service unless he first requests of and obtains from his local board a determination that it is in the

best interest of the war effort for him to leave such occupation or endeavor for other work.

2. Class II-C and Class III-C.—The Selective Service Regulations have been amended to provide two new classifications as follows:

> (a) In Class II-C shall be placed any registrant who has no grounds for deferment other than his occupation or endeavor and who is found to be necessary to and regularly engaged in an agricultural occupation or agricultural endeavor essential to the war effort.
>
> * * * * * * * * *

3. Classification in Class II-C and III-C.—In accordance with revised regulations and as rapidly as possible, local boards are directed to classify or reclassify in Class II-C or Class III-C all registrants who are necessary to and regularly engaged in an agricultural endeavor essential to the war effort. A registrant who is classified in Class II-C or Class III-C will not be reclassified and he may move around freely so long as he continues to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort. * * *

* * * * * * * * *

7. Continuation in Class II-C and III-C.—A registrant placed in Class II-C or Class III-C shall be retained in that class so long as he is necessary to and regularly engaged in an agricultural occupation or agricultural endeavor essential to the war effort and until a satisfactory

replacement in such agricultural occupation or agricultural endeavor can be obtained. When in the opinion of the local board a satisfactory replacement can be obtained for a registrant classified in Class II-C or Class III-C, it shall reopen and consider his classification anew. The local employment office of the War Manpower Commission shall furnish information to the local board concerning the types of farm workers currently available for replacement.

* * * * * * * * *

9. The war units plan—essential farm products.—Congress has recognized that the Nation is dependent upon agriculture for the successful prosecution of the war. The attainment of the largest production goals in history is of primary importance to the war effort. Every farm will need to make its maximum contribution to production of the farm products most needed in the war effort. The Department of Agriculture has devised and placed into effect and the War Manpower Commission has adopted the war-units plan as a way of measuring what each farm can contribute and as a basis for assisting each farmer in increasing his output. Essential products have been listed and appear in part I, appended. Those products less essential to the war effort are listed in part II. War units for the production of essential products are based chiefly on the amount of labor required. A national objective has been declared to be the production by as many farmers as possible of 16 or more war units.

10. Use of 16-war-unit objective as a guide in classification.—In determining whether a registrant engaged in the production of essential farm products qualifies for classification in Class II-C or III-C, local boards may give consideration to the 16-war-unit objective. It should be considered simply as an objective and to interpret it as a present-day standard upon which deferment is rigidly based would obviously be detrimental to essential production requirements for the Nation. At best, it simply represents a national objective which it is desired every able-bodied man engaged in agricultural production will equal or exceed. By reason of variations in production conditions and production methods as between regions, States, areas, and communities, the 16-war-unit objective may readily appear to a local board to be either too high or too low. When deemed advisable to properly reflect conditions existing within their own localities, local boards should deviate from the recommended objective. It would appear unreasonable, however, under most circumstances for a local board to consider a registrant for classification in Class II-C or III-C unless his own personal and direct efforts result in the production of at least 8 war units of essential farm products. In considering labor requirements for a particular farm, it should be borne in mind that war units are based upon the work performed by an able-bodied male adult. Each individual working on the farm other than an able-bodied male adult should be rated according to his work capacity, consideration being given to age, physical condition, or other work

impairments. For example: If a man is able to perform only half a man's work when actually employed at farm work, he should be rated one-half man equivalent. A local board would be entirely justified in classifying in Class II-C or III-C a registrant whose current production efforts do not equal the 16-war-unit objective but do exceed 8 war units of production, especially if there is an indication that diligent efforts are being made to increase production of essential farm products. In classifying a registrant, the basis should be his current and anticipated production in war units though in substantiating projected production estimates, past performances should be considered.

* * * * * * * * *

12. Consultation with County War Boards.—It is recommended that local boards request the assistance of Department of Agriculture County War Boards in reaching determinations based upon the use of conversion tables.

* * * * * * * * *

LEWIS B. HERSHEY,
Director.

War Unit.

A war unit is a measure of production of essential farm products. In the attached table essential farm products are given a relative value in terms of war units. The following, for example, are each equivalent to one war unit:

1 milk cow
20 feedlot cattle
1 acre in beets
5 acres in dry beans
20 acres in wheat
1 acre in carrots; etc.

Conversion Factor.

The conversion factor is the percentage that a given product, whether it be a single animal or a single acre of special type production, bears to a war unit, for example:

1 acre of wheat is .05 of a war unit;
1 acre of onions is 1.00 of a war unit;
1 acre of strawberries is 1.50 of a war unit; etc.

The number of acres given to a certain type of production or the number of animals of a specified type multiplied by the conversion factor results in the war unit value, for example:

3 range cattle multiplied by the conversion factor of .07 results in .21 war unit;

19 acres of Irish Potatoes multiplied by the conversion factor of .50 is equivalent to 9.50 war units; etc.

Group I.—Essential Farm Products and War Unit Conversion Factors

	Number of animals or acres equal to one war unit	Unit of production	Conversion factor
1. Livestock and Livestock Products:			
Beef Cattle:			
1. Farm herds	10	1 head	.10
2. Feedlot	20	1 head	.05
3. Range	15	1 head	.07
4. Stocker (bought and run on grass or grazed in fields)	75	1 head	.01
* * * * * * * * *			
Hogs:			
1. Sows to farrow, spring	3	1 litter	.33
2. Sows to farrow, fall	3	1 litter	.33
3. Feeder pigs (bought and sold during year)	30	1 head	.03
Poultry:			
1. Broilers and ducks	600	100 birds	.17
2. Hens, laying pullets, and ducks for egg production	75	100 birds	1.30
3. Flock replacement	300	100 birds	.33
4. Turkeys and geese	40	100 birds	2.50
* * * * * * * * *			

	Number of animals or acres equal to one war unit	Unit of production	Conversion factor
* * * * * * * * *			
Field Crops:			
1. Alfalfa hay (irrigated), broom corn, corn for grain and silage, dry edible beans, green peas for processing, rice, sweet corn for processing	5	1 acre	.20
2. Alfalfa hay seed, cover crop seed, nonirrigated alfalfa hay, grain sorghum, other tame hay and seed	10	1 acre	.10
3. Barley, dry field peas, oats and rye	15	1 acre	.07
4. Sweet corn for fresh consumption and hybrid seed corn..	3	1 acre	.33
5. Wild or native hay..	30	1 acre	.03
6. Wheat	20	1 acre	.05
* * * * * * * * *			
			622.25

National Headquarters
Selective Service System
Washington, D. C.

Local Board Memorandum No. 164-A

(Supplementing Local Board Memorandum No. 164)

Issued: 3/5/43

Subject: Classification of Registrants in Agriculture—Supplemental Information

* * * * * * * * *

2. Responsibility of State and County War Boards, United States Department of Agriculture.—The Secretary of Agriculture has designated State and County United States Department of Agriculture War Boards(hereinafter referred to as War Boards) as the agencies within the Department of Agriculture which other Government agencies may contact on the recruitment, placement, transfer, and utilization of agricultural workers. Agencies of the Selective Service System may therefore contact and consult with and be contacted and consulted by War Boards concerning these matters or concerning information pertaining to an individual registrant when considering his classification.

* * * * * * * * *

4. Use of information in possession of War Boards.—Local boards may make full use of the information which is available in the files of the County War Boards. Whenever necessary, the local boards may secure information concerning the agricultural activities of registrants from

or through the County War Boards. The local board should avoid requesting this information from the registrant or his employer when the same information has been obtained or is obtainable from the War Board.

* * * * * * * * *

8. Necessary agricultural workers not to be reclassified to fill calls.—The Congress has recognized the importance of food and fibre production and has by law provided for the deferment of each registrant who is necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort. The Congress has delegated to the local boards the administrative responsibility of deciding when and under what set of circumstances a registrant is necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort. Having made its decision that an individual registrant is necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, the local board has no further discretion and must defer the registrant. No desire to meet calls for manpower should in any manner influence the local board's decision. Calls which cannot be met without taking registrants considered necessary to and regularly engaged in agricultural occupations or endeavors essential to the war effort should be left unfilled.

Lewis B. Hershey,
Director.

APPENDIX B.

WL 310
LBR 48

United States Department of Agriculture
California USDA War Board
P. O. Box 247
Berkeley, California

March 20, 1943

War Letter No. 310

Labor ..... No. 48

Re: County War Board Responsibility
to Initiate Requests for Deferment
of Agricultural Registrants

Memorandum No. 975-33 from the Secretary of Agriculture and Selective Service Local Board Release No. 164-A, both of which were sent you in War Letter No. 301, place a definite responsibility on local county war boards with regard to the classification of agricultural registrants. The acceptance of this responsibility will entail considerable work on the part of county war boards, but by doing a good job, they can render assistance to agriculture.

These memoranda have been discussed at length with officials from State Headquarters of Selective Service. The following statements have also been reviewed by the State Director of Selective Service and meet with his approval. Copies of this letter have been furnished to Selective Service to be sent to all local draft boards in

order that there may be complete understanding on their part of the part that county war boards have in this activity.

In order to facilitate action on the part of county war boards and to bring about reasonable uniformity of action throughout the State, the following suggestions and comments are made:

1. Immediate action should be taken to inform farmers that the county war board is in a position to render assistance to them with regard to Selective Service problems. All farmers should be advised that they should file Selective Service Form 42A on all employees who are of draft age in order that such employees and employers be given proper consideration in so far as the operations of Selective Service are concerned.

2. It is the responsibility of local Draft Boards to refer to county war boards the names and addresses of persons engaged in agricultural occupations or endeavor, where there is a question as to whether or not such person would qualify for classification in II-C or III-C. Therefore, steps should be taken to work out a mutually agreeable arrangement for the handling of this procedure. It is suggested that each county war board contact local Selective Service Boards and, if possible, arrange a joint meeting to discuss matters of procedure and policy at the county level or local board level in connection with Selective Service Local Board Release No. 164-A.

Many county war boards have already established good working relationships with some or all of the draft boards in their counties. Where difficulties have been encountered in the past, another attempt should be made by the War

Board to arrive at a cooperative arrangement since War Boards now have definite responsibilities and cannot avoid frequent contact with the draft boards. In doing so it would be well to remember that the draft boards still have the job of classifying registrants even though War Boards now can be of real assistance. It would also be a good idea to become acquainted with the Selective Service coordinator who serves the draft boards in your county. He and the AAA fieldman have reviewed the instructions in detail and should be able to help in matters not clearly understood or where difficulties arise.

3. Since county war boards will now be making recommendations pointing to the classification of agricultural registrants in either II-C or III-C, plans should be made to follow up on such cases and report to the local draft board any changes in status of the registrants. Those no longer necessary to or regularly engaged in agricultural work are not entitled to be continued in these deferred classifications.

County war boards should be careful that agriculture does not abuse this privilege of II-C and III-C classification and one way to be certain is for War Boards to follow up on registrants who have been so classified at the request of War Boards.

4. In the event that an agricultural registrant is registered with a draft board that is not located in the same county in which the registrant is working, all Forms 42A and appeals and reports of investigation should be forwarded to the board in which the person is actually registered.

5. In cases where notice of induction has already been issued and local war boards believe that such a person

should be deferred, this information should be wired to the State War Board Office in order that proper action can be taken with the headquarters of Selective Service.

6. Since War Boards have only the one job of obtaining needed agricultural production, it should not be their responsibility to report their opinions as to whether or not an individual may be a draft dodger. County war boards are to report the actual status of the individual engaged in agricultural work, outlining the agricultural production that this individual is responsible for. The final decision with regard to whether or not an individual shall be inducted into the armed services rests with the local draft board or the appeal board, as the case may be.

7. Seasonal agricultural workers present an added problem in view of the fact that such persons move from one job to another. In these cases, Forms 42A should be filed by each employer with the registrant's draft board at the time that each person begins work for him. It is the obligation of the employer to notify the draft board at the termination of such employment. We cannot overemphasize the point that farm employers should at all times have on file a Form 42A for each employee who is subject to induction into the Armed Forces.

8. Attention is called to the paragraph "2" of Secretary's Memorandum No. 975-33. War Boards are given 30 days during which time the registrant whose agricultural activity is not sufficiently important to agriculture has an opportunity to establish himself with full-farm employment. If he cannot do so in this time he should not be in II-C or III-C. This section places great responsibility on War Boards, but it also gives them an oppor-

tunity to consolidate agricultural operations so there will not be wasted manpower. At the same time it enables them to assure continued production through retaining necessary men on farms. Already many such cases have been referred to county war boards and plans should be made to handle them efficiently.

9. Adequate provision should be made to give proper service to farmers and their employees relative to Selective Service problems. Since there will be a large volume of such work and since it will be of value only if correctly done, the following suggestions should be in order:

(1) County war boards should provide the necessary assistance at War Board offices, and perhaps elsewhere, to help farmers fill out Selective Service Form 42A.

(2) War Boards should also be in a position to initiate requests for the classification of agricultural registrants in II-C and III-C even though neither the registrant or his employer has requested deferment.

(3) Since Form 42A is a federal affidavit it will be necessary that such forms be signed in the presence of some person who is qualified to attest to such signature. A notary public, postmaster, member of a local draft board or a member of a selective service advisory board is so qualified. Please note that under law no charge can be made for notarizing this form.

(4) In case of Forms 42A filed by the county war board the forms should be signed by the chairman of the War Board or by some other member of the War Board who has been designated for that pur-

pose. The draft boards in the county should be notified in writing with sample signatures of the persons who will sign Form 42A for the War Board.

(5) All reports made to local draft boards must be in writing. Reports made over the telephone or verbally are not acceptable and have no standing at all if the case is appealed. In order that all the necessary information be provided to the draft board, War Boards should use the attached form in making reports. Since the USDA War Board Case Report Form does not have the same status as Selective Service Form 42A, this form should be attached to a Form 42A. The 42A should be completed only in so far as the first three lines of information are concerned on that form. Under the item of "Title of present job" the notation should be made "See Case Report Form attached." The 42A which is attached to the Case Report should be duly signed by the chairman of the War Board or by a designated member. This signature must be properly notarized as indicated in paragraph 9(3). Please advise the draft boards in your county that this form is being used in order to get complete and uniform reports. In the past many cases have not received due consideration because of incomplete information and the use of this form should eliminate such mistakes or omissions.

(6) County war boards can and should file appeals where they believe registrants are not properly classified. In making appeals they should always be in writing and the word "appeal" must appear

in the document. A letter or statement can serve for this purpose. Also, the proper selective service form may be filled in and signed at the draft board office. Such appeals should be directed to the local draft board. All pertinent facts concerning the case should be set forth clearly and concisely.

(7) Before a Form 42A is filed by a county war board or a report is made upon request of a draft board or an appeal is filed, there should be an investigation of the case. These investigations must be made currently in order to show the correct facts at the time the report is made. Arrangements should be made so that investigations can be made promptly and in a reliable manner with as little expense and travel as possible. It is recommended that the services of AAA county and community committeemen and the field personnel of all agencies be used for this purpose.

(8) In making investigations the first step should be (as in all other cases where farmers are being assisted by county war boards) to refer to the Farm Registration Form for the farm. If one is not on file, the contacts that are made to investigate the need for this draft classification should be used to get a completed Farm Registration Form.

10. The success of this program will depend to a large degree upon the cooperation between county war boards and local Selective Service draft boards. In view of the close working relationship between War Boards and county draft boards, every effort must be made to work out necessary plans of operation which are acceptable to all concerned. We realize, due to the vast number of draft

boards involved and the various conditions which exist between different parts of the State, that no one over-all policy would be equally applicable. As problems develop which cannot be worked out locally between War Boards and local draft boards, such should be reported to the AAA district fieldman or to the State War Board Office. We feel that such problems can be properly taken up with the headquarters of the State Selective Service system and solved to the mutual benefit of all concerned.

11. Under separate cover this office will provide a small supply of Forms Calif. WB No. 26. These forms should be prepared in duplicate in order that a complete record of all cases can be maintained in the War Board office. Additional copies may be obtained from this office if needed.

DAVE DAVIDSON,
Dave Davidson,
Chairman California USDA War Board

Attachment:
Calif. WB Form No. 26

No. 10765

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NELSON B. CRAMER,

Appellant,

vs.

COL. JESSE G. FRANCE, etc.,

Appellee.

APPELLEE'S BRIEF.

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No. 10765

IN THE

United States Circuit Court of Appeals

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NELSON B. CRAMER,

Appellant,

vs.

COL. JESSE G. FRANCE, etc.,

Appellee.

APPELLEE'S BRIEF.

Statement of the Case.

Appellee objects to any reference in appellant's Statement of Case [R. 3-5] to the Amended Petition for Writ of Habeas Corpus as though the allegations of the same had been proved or stipulated to as facts in the matter. Whatever proof of those allegations was presented in the case came from Petitioner's Exhibit 1, only a portion of which is printed in the Transcript of Record [R. 56-98].

While the broad outline of the Statement of Case presented by appellant is substantially correct, appellee believes that certain implications therein are not entirely correct. For example, it is implied (Br. 4) that the State Director of Selective Service might have received the report from the Governor of South Dakota requested by appellant, but that he did not consider it. This is not correct because the State Director did defer induction for the

express purpose of receiving said report, and it was only after submission thereof to him that he finally approved the action, not of the local board, but of the appeal board.

Appellee does not desire to controvert the other implications in the Statement of Case because we believe it would serve no good purpose as the facts upon which appellant specifies error seem sufficiently clear; and, as a matter of fact, appellant does not use the various implications as a basis of argument.

Questions Presented by the Appeal.

1. Is a review by the court of Selective Service classifications by habeas corpus after induction limited to a consideration of whether the inductee was deprived of his constitutional right to due process; *i. e.,* denied a fair hearing by a refusal to receive and consider evidence submitted by the inductee as a registrant; or should the court in its review determine whether or not the classification is based upon substantial evidence and whether or not the boards were arbitrary and capricious?

2. Should such a judicial inquiry be directed to the character of the hearing afforded and classification made by the local board or by the board of appeal?

3. If, in answer to question 1, this court states that the review is limited to a consideration of whether the inductee was denied a fair hearing, did appellant raise the question in the trial court when he alleged only that there was not substantial evidence and that the boards were arbitrary and capricious; and if so, was he denied a fair hearing?

4. If, in answer to question 1, this court states that in a review of the classification it is to determine whether or not the classification was based upon any or substantial evidence and whether or not the boards were arbitrary and

capricious, was the classification based upon any or substantial evidence and were the boards arbitrary and capricious?

5. Did the lower court commit any errors prejudicial to appellant in arriving at its decision?

ARGUMENT.

A. Appellee's Position.

A review by the courts of Selective Service classifications by habeas corpus after induction is limited to a consideration of whether the inductee was deprived of his constitutional right to due process; *i. e.,* denied a fair hearing by a refusal to receive and consider evidence submitted by the inductee as a registrant. And in so determining, the judicial inquiry must be directed to the character of the hearing afforded by the board of appeal since that board's classification supersedes that of the local board.

Under such a scope or rule of review, the action of the District Court must be affirmed without consideration by this court of the evidence before the local board, appeal board, or trial court, and without any consideration of the specifications of error relied upon by appellant because appellant does not, and cannot, contend that the Selective Service boards have refused to receive and consider evidence submitted by him. Further, in reviewing the action of the appeal board to determine whether it afforded the appellant a fair hearing, it must be presumed, in absence of evidence to the contrary, that the said board acted fairly and honestly. There is no evidence to the contrary in this case.

However, appellee submits that even if the rule of review suggested by appellant; *i. e.,* the substantial evidence

rule, the action of the District Court was not erroneous and should be affirmed. Not only is there substantial and competent evidence to support the classification of the local board, and no evidence of any capricious, arbitrary, or unfair action, but any charge made by appellant of error must be directed as well to the action of the board of appeal. With that controlling restriction in mind, the correctness of the District Court's decision is obvious and not even strongly contested.

Appellant contends that the District Court committed certain errors in arriving at its decision. Appellee's position thereon is that no errors were committed, but if any errors were committed, none of them were prejudicial to appellant.

B. A Review by the Courts of Selective Service Classifications by Habeas Corpus After Induction Is Limited to a Consideration of Whether the Inductee Was Deprived of His Constitutional Right to Due Process; i. e., Denied a Fair Hearing by a Refusal to Receive and Consider Evidence Submitted by the Inductee as a Registrant.

1. *The review by the courts of Selective Service classifications by habeas corpus after induction is limited to a consideration of whether the inductee was deprived of his constitutional right to due process.*

The question as to the scope of review by the courts of Selective Service classifications by habeas corpus after induction has been heretofore considered by this court and such review has been held to be limited to a consideration of whether the inductee was deprived of his constitutional

right to due process. Thus, in *Crutchfield v. United States,* 142 F. (2d) 170, 173, this court said:

> . . . the power of review by the courts, if it exists at all, is limited to a consideration of whether the board deprived appellant of his constitutional right to due process, that is, a fair hearing after notice.

Again in *Bagley v. United States,* ..... F. (2d) ..... (decided June 14, 1944), this court indicated that the subject of inquiry is limited to questions of "due process."

It would appear that there could be no basis for contending for any broader scope of review than that announced by this court. Nevertheless, in the absence of a decision by the Supreme Court on this specific issue and in view of certain general ambiguous statements made by other courts, when unnecessary to decide the case before them, it is proper, we believe, to demonstrate the soundness of this court's statement as to the scope of review.

Since colonial days the duty of performing military service has been inherent in citizenship. Militia duty was imposed upon all arms-bearing citizens of the original thirteen states during the eighteenth century. When the Constitution was adopted, it was recognized that there should be no limitation on the power to raise armies. As stated by Alexander Hamilton in No. 23 of *The Federalist:*

> . . . there can be no limitation of that authority . . . in any matter essential to the *formation,* direction, or support of the National forces. (Emphasis supplied.)

Military service has never been considered a denial of any fundamental right or freedom. Consequently, under the Constitution, Congress has the power to call the man-

power of the nation for military service in whatever manner it deems appropriate. The only rights which those affected have are the rights which are given by Congress. *Selective Draft Law Cases,* 245 U. S. 366; *Jacobsen v. Massachusetts,* 197 U. S. 11; *Hamilton v. Regents,* 293 U. S. 266; *Falbo v. United States,* 320 U. S. 549; *Local Board v. Connors* (C. C. A. 9), 124 F. (2d) 388, 390.

Since no constitutional or fundamental rights are infringed when a man is called for military service, there is no necessity for Congress to provide for the judicial review of the findings of drafts boards made in classifying registrants. Even though such review might nevertheless have been provided, Congress specifically rejected such a proposal.

Experience under the Draft Act approved March 3, 1863, demonstrated that judicial review of draft classifications was a dangerous impediment to the raising of an army in time of national peril. The situation was described as follows by the Provost Marshal General in his final report on the above Act to the Secretary of War:

> During this draft the practice of serving writs of habeas corpus on the officers of the bureau became so prevalent as to interfere seriously with the progress of the business.

When it became necessary for Congress to adopt a draft act in 1917, the experience under the 1863 Act was carefully considered. At the hearing on the Selective Service Act of 1917, General Crowder, the Provost Marshal General, said:

> In the legislation of 1863 the judgment of the board of enrollment provided for in that legislation was made conclusive upon the authorities, notwithstanding which, however, the courts undertook to inquire into

> the decision of the enrolling boards in granting or refusing exemptions. This bill makes the judgment of such agencies as the President may constitute conclusive upon the questions of fact, so that the courts would not be able to inquire into the findings of fact. (Hearings before the Committee on Military Affairs of the House of Representatives on the Selective Service Act of 1917, 65th Cong., 1st Sess., p. 94.)

The legislative history of the 1917 Act shows that Congress rejected proposals for judicial review of draft board findings. The Act as originally introduced made no provision for boards of appeal. It was amended by the Committee on Military Affairs of the House of Representatives to provide as follows:

> Upon the complaint of any person who feels himself aggrieved by his enrollment or draft as herein provided any court of record, state or federal, having general jurisdiction in matters pertaining to the writ of habeas corpus, according to state laws or by act of Congress, shall have jurisdiction, by proceedings in the nature of the writ of habeas corpus, to hear summarily and determine the rights of such person. (Cong. Rec. 65th Cong., 1st Sess., p. 1259.)

The following discussion took place on the floor of the House on April 23, 1917:

> Mr. Crisp: From the hearings I understand that the bill made the findings of this board conclusive as to questions of fact, and that the court could not go beyond the findings of the board as to questions of fact.

> Mr. Dent: It leaves the matter open to the courts. It repudiates that other proposition. (Cong. Rec. 65th Cong., 1st Sess., p. 964.)

The following statement was also made on the floor of the House during consideration of the bill:

> Mr. Shallenberger: When the bill was brought before us no appeal was provided, and in the judgment of the committee we thought that was unwise, and so the amendment offered by Judge Harrison was placed in the bill providing that an appeal from the board to the local court with proper jurisdiction was to be allowed. (Cong. Rec. 65th Cong., 1st Sess., p. 1509.)

The House of Representatives passed the bill containing the above amendment and providing for the judicial review of draft board findings.

Similar bills had been introduced simultaneously in the House and the Senate. During the consideration of the Senate bill, which was reported out of committee with no provision for boards of appeal or for judicial review, Senator Hardwick said:

> The House of Representatives . . . left him the right of habeas corpus in the courts. Under this bill the findings of whatever military commission may be appointed are absolutely binding and final on all questions of fact. (Cong. Rec. 65th Cong., 1st Sess., p. 1327.)

Senator La Follette presented an amendment providing for boards of appeal in lieu of review by the courts. Later,

Senator Kellogg presented a similar amendment which was agreed to. Thus, the Senate rejected the protection by way of habeas corpus contained in the House bill and adopted the system of boards of appeal. The House agreed to the Senate proposal and the provision for judicial review by habeas corpus of findings was eliminated, leaving the findings of the boards of appeal final.

The Selective Training and Service Act of 1940 incorporated the same provisions relative to the finality of classifications as those contained in the 1917 Act. There was no discussion at any stage relative to the question of judicial review. Consequently, it is evident that Congress intended the 1940 Act to have the same force and effect as the 1917 Act, as shown by the legislative history of the 1917 Act and as construed by the courts in the cases arising thereunder.

The strenuous efforts made in 1917 and 1918 to secure judicial review of draft classifications were unsuccessful. The courts stated that only when an inductee had been denied the due process provided for in the Act would the courts intervene. The rule was stated in the following words:

> "It is only when the action of such a board was without jurisdiction, or if, having jurisdiction, it failed to give the party complaining a fair opportunity to be heard and present his evidence, that the action of such a tribunal is subject to review by the courts."
>
> *Franke v. Murray* (C. C. A. 8), 248 Fed. 865.

"We have only to inquire whether the relator's appeal was fairly heard and determined."

United States v. Kinkead (C. C. A. 3), 250 Fed. 692.

"It appears from the allegations of the complaint that the complainant filed an affidavit claiming exemption by reason of the fact that he was an alien, and that the local board denied his application, and that he appealed to the district board, which affirmed the local board. It thus appears that the complainant was heard, and it is nowhere alleged that he was denied a full hearing or that the board rejected or refused to consider any evidence he was entitled to present. In the absence of such a showing, we have no doubt that the decision of the board is final and cannot be interfered with by the courts. . . .

"We think a decision of the boards is final only where the board has proceeded in due form, and where the party involved is given a fair opportunity to be heard and to present his evidence."

Angelus v. Sullivan (C. C. A. 2), 246 Fed. 54.

Any broader expressions as to the extent of judicial review appearing in certain opinions of the lower courts in cases under the 1917 Act may not, we believe, be said to have been controlling when Congress passed the 1940 Act. As a matter of fact, a review of all the reported habeas corpus cases under the 1917 Act discloses only four

instances in which inductees were released by the courts because of their classification.[1]

We find, then, that there is no constitutional or statutory provision for judicial review of the findings of the boards created under the Selective Training and Service Act of 1940. Such review is therefore limited, as this court has said, to the question of whether the inductee has been denied due process.

---

[1]It will be noted that each of these four cases involved a non-declarant alien and the 1917 Act contained the following provision:

> Such draft as herein provided shall be based upon the liability to military service of all male citizens or male persons not alien enemies who have declared their intention to become citizens.

Since non-declarant aliens had no fundamental obligations to serve under the 1917 Act, they occupied a different status from citizens or declarant aliens who were exempted or deferred. These four cases are the following:

> *Ex parte Hutflis* (D. C. N. Y.), 245 Fed. 798. In this case the court found that the non-declarant alien had been given the wrong forms to fill out and he was unable to know of the mistake.
>
> *Ex parte Cohen* (D. C. Va.), 245 Fed. 711. Here the registrant filed with the board conclusive documentary proof that he was a non-declarant alien. There was nothing before the board to contradict or cast any doubt or suspicion on this proof. It should be noted that the question of alienage was susceptible to definite proof and involved no exercise of judgment on the part of the boards, differing from questions of whether a farmer can be replaced.
>
> *Arbitman v. Woodside* (C. C. A. 4), 258 Fed. 441. This case is similar to the *Cohen* case.
>
> *Ex parte Beck* (D. C. Mont.), 245 Fed. 967. In this case the court held that non-declarant aliens were *excluded,* even though they had not claimed exemption. This holding was reversed in *Napore v. Rowe* (C. C. A. 9), 256 Fed. 832. However, it demonstrates the special problem presented by the non-declarant alien cases under the 1917 Act.

Cases in which registrants under the 1917 Act had been automatically inducted and sought relief from court martial for desertion must be distinguished from the cases involving questions as to classification. It was such a desertion case in which the court said:

> The induction of a civilian into military service is a grave step, fraught with grave consequences. *Van Mehren v. Sirmyer* (C. C. A. 8), 36 F. (2d) 876, 881-2.

Under the 1917 Act delinquents were made deserters, without the necessity of any actual notice to them, and thereby became subject to the severe penalty for desertion in time of war. This making of a deserter out of an unwitting registrant was the "grave" consequence the courts were considering. Military service itself was not so considered or described.

2. *The provisions of the Selective Training and Service Act of 1940 and the Regulations issued thereunder afford adequate protection for the rights of the individual registrant and afford him due process of law.*

Even though the need for men for the armed forces has been most urgent, and delay in the selection process could be most dangerous, Congress and the President have created a plan of selection and induction designed to grant every reasonable protection to registrants. The first step in the process is the filing of a questionnaire by the registrant, plus any other information he deems pertinent. Ten days are allowed for the filing of the questionnaire and advisory boards, usually composed of lawyers, provide free assistance to all registrants. (Part 621 of the Selectice Service Regulations, Second Edition.)

The classification of a registrant is made in the first instance by his local board, composed of uncompensated civilians from the locality in which he is registered. The local board is required to place in the registrant's file a summary of any information, not already in the file, relied on in making the classification. When the local board has classified a registrant, it shall mail a notice thereof to the registrant, advising him not only of his classification but of his rights to a personal appearance and appeal. (Part 623.)

Following his classification, the registrant is given the right to appear in person before his local board. At such time the registrant may present such further information as he believes will assist the local board in determining his proper classification. After his appearance, the local board is required to consider again the registrant's classification and notify him of the result. (Part 625.)

The registrant has the right to appeal to the board of appeal within 10 days after he is finally classified by the local board. He is provided the free assistance of the government appeal agent, an attorney, in perfecting his appeal. The person appearing may attach to his notice of appeal a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the file. The registrant may not be inducted during the time afforded him for taking an appeal or while his appeal is pending.

When an appeal is taken, the local board forwards the registrant's entire file to the board of appeal. The board of appeal is composed of representatives of agriculture, labor, industry, etc., and is therefore familiar with the needs of the country in general as well as the needs of the armed forces. The board of appeal first checks the registrant's file to determine whether all steps required by the regulations have been taken, whether the record is complete, and whether the information in the file is sufficient to enable it to determine the registrant's classification. If not, the file is returned to the local board for further appropriate action. The board of appeal shall not consider any information not contained in the record received from the local board except general information concerning economic, industrial and social conditions.

The board of appeal classifies the registrant *de novo,* giving consideration to each class in the proper order. The registrant is notified by the local board of the action of the board of appeal. (Part 627.)

The registrant has 10 days in which to appeal to the President after receiving notice of the action of the board of appeal. However, he has a right to such appeal only in the event one or more members of the board of appeal dissented from such classification. In addition to the registrant's right of appeal to the President in the absence of a unanimous vote by the board of appeal, the State Director or the National Director of Selective Service may appeal any classification to the President at any time when they deem it to be in the national interest or necessary to avoid an injustice. The registrant is free to request such an appeal by the Director. (Part 628.)

Even after a registrant is inducted he may be discharged by the armed forces upon a claim that he was erroneously inducted. Such applications are submitted in writing by the inductee to his commanding officer. They are then forwarded to the State Director of Selective Service for a recommendation. (Local Board Memorandum No. 80, as amended April 28, 1943.)

The Circuit Court of Appeals for the Third Circuit has recently had occasion to point out that this procedure constitutes due process. In *United States v. Pitt,* decided July 27, 1944, that court said:

> The means embodied in the Act for the raising of armed forces for the national defense bear a real and substantial relationship to the danger which had materialized with great rapidity upon the horizon of our national life. . . .
>
> We doubt if a better, fairer method could be devised to meet the requirement of raising armed forces in an emergency. We are of the opinion, therefore, that the provisions of the Act afford adequate protection for the rights of the individual registrant, that

they afford him due process of law, and that the Act is constitutional in all respects.

The question here considered was discussed in *"Due Process" and the Selective Service System* by James Thomas Connor appearing in the Virginia Law Review, Vol. XXX, No. 3, June, 1944. It was there said:

> When it is remembered that the Selective Service System is designed to meet a desperate emergency and to it has been given the mission of augmenting a pitifully small standing Army, it must be acknowledged that the requirements of "due process" so far as it demands fair notice and adequate hearings have been met to a reasonable degree.

What was stated by the Circuit Court of Appeals for the Third Circuit on July 27, 1944, in *United States v. Pitt* had been, in effect, recognized as early as December 13, 1941, by this court in its opinion in *Local Board v. Connors,* 124 F. (2d) 388. In fact, this court in *Local Board v. Connors* had occasion to consider and decide the first case on appeal under the 1940 Act involving the general question of the judicial review of Selective Service classifications.

3. *Since the procedure provided by the Selective Service System affords due process of law, it is only when the Selective Service boards have refused to receive and consider evidence submitted by a registrant; i. e., denied him a fair hearing, that a question of denial of due process is present.*

As pointed out above, this is the rule expressed by this court in *Crutchfield v. United States,* 142 F. (2d) 170. It was also contained in *Stanziale v. Paullin* (C. C. A. 3),

138 F. (2d) 312, reversing 49 F. Supp. 961, certiorari denied 320 U. S. 797, where the court said:

> The task of classification of the nation's manpower for service in its defense differs greatly from the ordinary administrative action affecting an individual or a group. It is country-wide in scope, it includes a large portion of the population and obviously its operation must be both smooth and swift if the public object is to be accomplished. The enemy will not wait for the process of litigation to determine who must and who may not fight.
>
> The procedure under the Selective Service Act necessarily, then, differs from the usual administrative routine. There are no hearings of right where witnesses may be called and examined and cross-examined. There is no representation by counsel either on behalf of the registrant or the Local Board. Nor are findings of fact and conclusions of law made. There is no statutory provision for judicial review. The "administrative tribunal," if the Local Draft Board may so be called, is not composed of experts, real or purported, but of citizens of the neighborhood in which their Board functions. In some cases it knows the registrants personally; in all cases it knows its own community. The analogy of the ancient jury of the vicinage suggests itself, composed of men of the neighborhood, who knew what was going on. Questionnaires answered by the registrant and supporting written statements present his status, from his point of view, to the Board. But these are not the sole determinants of his classification. Quotas that must be filled and the number of registrants available for military service within a given community are major factors for the Board's consideration. All the Local Board does after a consideration

of these facts is to place the registrant within one of the given classifications. The registrant, and he alone, may then appear personally, of right, before the Board to argue the correctness of his classification. Appeals to Selective Service Appeal Boards, and in some cases, ultimately to the President, may be had, but only the written file of the registrant goes up on appeal.

It is clear under the procedure prescribed by Congress that the classification of registrants is for the Draft Boards, not the courts. Should a case be one where the court is to interpose, the order should be a remand to the Draft Board to classify the registrant properly, not to make the classification itself. It is also clear that a court's criterion must be something different from the "substantial evidence" rule so familiar in administrative review. There is no transcript of whatever conversations the registrant may have had with his Board. There is no record showing the manpower situation in the district at the time of classification, how many men a particular Board was called upon to furnish at a given time and how big a list of available registrants it had. The test of whether a Draft Board's action may be attacked seems to shift from whether its findings are supported by substantial evidence to whether it received and considered what a particular registrant submitted. And lack of such consideration is not here, as it is not elsewhere, proved by proving that the decision was wrong.

This rule was expressed as follows in *Judicial Review of Selective Service Board Classifications by Habeas Corpus*, 10 Geo. Wash. L. Rev. 827, 837:

It is suggested, therefore, that the denial of a fair hearing must be established by independent evidence,

> and that such evidence must relate to the proceedings of the appeal board and not the local board. This contemplates something more than examining the evidence upon which the appeal board classified the registrant. If the registrant is able to prove that the appeal board refused to consider the record, bearing in mind, however, that it need not accept sworn and uncontradicted statements as true; or that his file never reached the appeal board; or that the board members were bribed or prejudiced, or that certain evidence was lost or destroyed, then the court may properly conclude that the registrant has not been given a fair hearing and that its findings were made arbitrarily. If it appears, however, that all the proper evidence offered to the appeal board was accepted and considered there is no basis for court action. A court may be of the opinion that a given board was wrong but it is precluded by law from offering a remedy.

In connection with the above three authorities, it will be noted that the Circuit Court of Appeals for the Second Circuit in *United States ex rel. Trainin v. Cain,* decided August 15, 1944, said:

> . . . On this latter point many cases, without sharp consideration of the issues, merely state the now usual rule of review applied to many administrative agencies, namely, that review of the facts is limited to ascertaining whether there is "substantial evidence" to support the findings of the agencies. *Rase v. United States,* 6 Cir., 129 F. 2d 204, 207; *Graf v. Mallon,* 8 Cir., 138 F. 2d 230, 234-235; *Johnson v. United States,* 8 Cir., 126 F. 2d 242; *Benesch v. Underwood,* 6 Cir., 132 F. 2d 430, 431; *Seele v. United States,* 8 Cir., 133 F. 2d 1015, 1021; *United States v. Messersmith,* 7 Cir., 138 F. 2d 599; *Arbit-*

man v. Woodside, 4 Cir., 258 F. 441. There seems, however, considerable tendency to state a more limited rule than this, such as that examination is only to determine whether there is any evidence at all to support the findings of the local boards, *Checinski v. United States,* 6 Cir., 129 F. 2d 461, 462; *United States v. Buttecali,* D. C. S. D. Tex., 46 F. Supp. 39, 44, affirmed *Buttecali v. United States,* 5 Cir., 130 F. 2d 172; *United States v. Pace,* D. C. S. D. Tex., 46 F. Supp. 316, or even more strictly whether the boards have considered all the evidence presented to them, without regard to what their conclusions may be. *Ex parte Stanziale,* 3 Cir., 138 F. 2d 312, 313-315, certiorari denied *Stanziale v. Paullin,* 320 U. S. 797; *Crutchfield v. United States,* 9 Cir., 142 F. 2d 170, 173-4; Note, *Judicial Review of Selective Service Board Classifications by Habeas Corpus,* 10 Geo. Wash. L. Rev. 827, 837-838; . . . In this circuit, however, we seem practically committed to the test of whether the local board had any evidence before it to sustain its result.

It will be seen that the Circuit Court of Appeals for the Second Circuit in the *Trainin* case adopted the test of whether the Selective Service boards had any evidence before them to sustain the classification, rejecting the "fair hearing" rule announced by this court in the *Crutchfield* case and the Third Circuit in the *Stanziale* case. We believe that it is important to understand that the "fair hearing" rule is the proper rule rather than the "no evidence" rule.

The difficulty resulting from the application of the "no evidence" rule was discussed in *United States ex rel. Levy v. Cain* (D. C. E. D. N. Y.), decided June 20, 1944. In that case District Judge Byers said:

> Upon the foregoing statement of facts, the Court is requested to sustain the writ upon the theory which has been stated; in other words, to overrule the action of the Board because it must be deemed to be erroneous by so wide a margin that no other conclusion is possible. Apparently it is thought that in extreme cases the Court is to substitute its judgment for that of the Local Board. . . .
>
> The file is convincing that this relator has been given a full and complete opportunity to present his contentions, and the only possible basis upon which the writ could be sustained would be that of disagreement with the conclusions of the Local Board. . . .
>
> It is a constant temptation to think of those whose opinions and conclusions differ from our own, as being at least arbitrary and capricious. The processes of the Court, however, are not available for the gratification of such beliefs, even if they exist.

Once the "no evidence" rule is adopted, the court is necessarily faced with the problem of reviewing the evidence. Since in most Selective Service cases there is no available record of all the facts and evidence which properly entered into the judgment of the board, it follows that it is impossible for a court to determine whether or not there was any evidence before the boards. At the same time, when the "no evidence" rule is applied, the result will usually be the application of the "substantial evidence" rule, which has been generally rejected.

In considering the reasons why the "fair hearing" rule announced by this court is the proper rule, certain fundamental features of the Selective Service System must be reviewed. The selection of men for the armed forces is in no way an adversary proceeding. This has been expressed as follows:

> You [local boards] are not a court for the adjustment of differences between two persons in controversy. You are agents of the Government . . . and there is no controversy. (Second Report of the Provost Marshal General on the 1917 Act, p. 283.)

The second point to be considered is that local boards and boards of appeal are selected for their knowledge and understanding of conditions which affect the equities of individual classifications. Boards are not to ignore matters of common knowledge as to general conditions and such matters need not and cannot be reduced to writing and included in every registrant's file. In fact, the regulations (Sec. 627.24(b)) specificaly provide that the board of appeal shall consider general information available to it concerning economic, industrial, and social conditions.

Another feature is that the boards are not required to make findings of fact. This must be considered in connection with the rule that the boards need not accept sworn statements submitted by registrants as true, even though no contrary or impeaching evidence appears in the file. *Chin Yow v. United States,* 208 U. S. 8, 12.

Still another element to be considered is the necessary element of informality which accompanies the work of Selective Service boards. There are approximately 30,000,000 registrants within the age group liable for military service who have had to be classified and reclassified under changing statutes and regulations. Between July 1, 1942, and April 1, 1944, there were 56,086,271 classification actions taken by local boards. It will be remembered that the board members are volunteers, that they are usually not lawyers, and that they are not provided with the facilities for making stenographic reports of their proceedings.

These considerations are of special importance when matters of judgment are involved, as is usually the case in Selective Service classifications. Thus, in considering the deferment of a farmer, the boards must decide whether the registrant is "necessary to" an agricultural occupation and whether a "satisfactory replacement can be obtained." These facts can ordinarily never be conclusively established one way or the other. It is only through the application of the judgment of the local board and board of appeal to the facts as shown by the registrant's file in the light of the general information available to them that the classification is made.

We believe that the "fair hearing" rule announced by this court is not only correct as a matter of law but that it provides ample protection to registrants. In view of the many procedural safeguards contained in the Selective

Service process, any review by a court beyond the issue of a fair hearing would be a substitution of the court's judgment for that of the duly constituted boards as to the facts in the case.[2]

C. In Determining Whether an Inductee Has Been Denied "Due Process" in His Classification, the Judicial Inquiry Must Be Directed to the Character of the Hearing Afforded by the Board of Appeal, Since the Board of Appeal's Classification Supersedes That of the Local Board.

The Regulations (Sec. 627.26) provide that the board of appeal shall classify the registrant, which means that

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[2]This court has analyzed in detail the scope of judicial review in deportation cases in *Bridges v. Wixon*, decided June 26, 1944. It was there stated that such review is limited to a consideration of denial of due process, the same as in Selective Service cases. However, it was also stated that there would be a denial of due process if the court was unable to find "any evidence" in the record to support the action of the Attorney General. However, as we have heretofore suggested, this "no evidence" rule, while applicable in deportation cases, is not an appropriate test in Selective Service cases.

This is true largely because of the difference in the procedure in deportation cases from that in Selective Service classifications. A deportation hearing is an adversary proceeding. Evidence is received, similar to that received in a court proceeding, and transcripts are kept of the evidence. The number of such cases is small, as compared to Selective Service cases, and trained, paid personnel is available. There is no necessity for speedy determinations as in Selective Service cases. Findings of fact and conclusions of law are usually made in deportation cases. Ordinarily, questions of judgment are not involved in deportation cases to the extent that they are present in Selective Service classifications. In deportation cases the administrators are not usually faced with considering matters of common knowledge as to labor, social, and economic conditions, plus the relative and changing needs of the armed forces, as is true in Selective Service cases. Thus, even if the same "no evidence" rule were thought to be applicable to Selective Service cases as well as to deportation cases, it could not be applied in anything like the same manner.

There is the additional factor that deportation is in the nature of a penalty. When an American is called to serve his country in the armed forces, he is not being in any sense penalized but is merely being called to perform a fundamental obligation of citizenship. It is this distinction, of course, that permits the classification system to operate in the summary manner necessary for the speedy raising of an army and navy, even though it results in the courts being unable to review the proceedings to the same extent that such review is had in deportation cases.

the board of appeal acts *de novo*. This situation was described as follows in *United States v. Pitt, supra*:

> An appeal board is bound in nowise to award to the registrant the classification given to him by his local board. In fact, an appeal board must hear and dispose of each case *de novo* in the same manner as must an appellate tribunal on an appeal in admiralty . . . Each appeal board therefore independently imposes a classification upon a registrant without regard to that which was given him by his local board. Moreover the classification of the appeal board supersedes that of the local board.

The action of the board of appeal was discussed as follows in *"Due Process" and the Selective Service System, supra*:

> The Board of Appeal reviews the record *de novo,* so to speak. That is to say, the Regulations require that the Board of Appeal *classify* the registrant following exactly the same progression of classification as was followed by the Local Board except that it may not give consideration to Class IV-F because of physical or mental disability. The Board of Appeal is in every respect a higher classifying agency and is not in any sense a board of review. The Board of Appeal is required to address itself to the question of what is the registrant's proper classification rather than to the question whether or not the classification of the Local Board was correct. (pp. 445-6.)

The same matter was considered in *Judicial Review of Selective Service Board Classifications by Habeas Corpus, supra,* where it was said:

> It should be noted also that the Selective Service Regulations provide that the appeal board shall review all the evidence which was before the local board plus that which the local board rejected, and make a decision *de novo* as to the proper classification for the registrant . . If he has taken an appeal to the appeal board, the conduct of the appeal board only is subject to examination by the court in determining whether a fair hearing has been given. If the local board should deny the hearing it is required to give and arbitrarily places the registrant in Class I-A, an appeal from this classification to the appeal board conducted in accordance with the regulations cures the action of the local board. . . . (p. 837.)

In *Bowles v. United States,* 319 U. S. 33, the Supreme Court recognized and applied this rule, holding that the alleged illegal action of the board of appeal was immaterial in view of the later and controlling determination made on appeal to the President. See also concurring opinion of Mr. Justice Rutledge in *Falbo v. United States,* 320 U. S. 549, 555.

The reason for having the board of appeal classify the registrant *de novo* is found in the necessity for expeditious action in the selection and induction of men. By requir-

ing the registrant to submit all of his complaints to the board of appeal and by giving the board of appeal full and complete classifying power, it is possible to protect a registrant adequately and at the same time to bring the classification process to the necessary early conclusion.

It will be noted that the Regulations (Sec. 627.12) provide that the registrant may direct the board of appeal's attention to all irregularities which the local board may have committed and the registrant is provided without cost the assistance of an attorney, the government appeal agent, in perfecting his appeal. The registrant may also, of course, have the help of his own attorney in preparing his appeal. If the registrant fails to take advantage of this opportunity to advise the board of appeal of the alleged irregularities by the local board, it may not be said that he has exhausted his administrative remedies. When the registrant does present his allegations of irregularity to the board of appeal, they are necessarily passed on when the board of appeal acts. If the board of appeal finds that the alleged irregularities are such as to make it impossible for it to classify the registrant fairly, the board of appeal will return the case to the local board with proper instructions. (Sec. 627.23.) The question of whether the registrant was denied due process will then be resolved solely by determining whether the board of appeal accorded the registrant's case fair consideration.

D. Under Such a Rule of Review, viz.: The Fair Hearing Rule, the Action of the District Court Quashing the Writ, Dismissing the Proceedings and Remanding Appellant Must Be Affirmed Because Appellant Does Not, and Cannot, Contend That He Was Denied a Fair Hearing by the Board of Appeal, or Even the Local Board.

1. *Appellant does not allege, claim or specify that the Selective Service boards have refused to receive and consider evidence submitted by him as a registrant.*

Aside from the rule that the appeal board's classification supersedes that of the local board (*supra,* p. 23), appellant has never claimed at any time during the entire proceedings, nor has he now specified as error, that the Selective Service boards have refused to receive and consider evidence submitted by him. His basic complaint, as will be hereinafter noted, is that there is no evidence to support the local board's decision.

As a matter of fact any such contention on his part would be fallacious because it is apparent that the local board ,appeal board, and State Director of Selective Service at all times did their utmost to allow appellant as a registrant to present to them whatever he desired in the way of evidence in support of his position. No purpose would be served by referring to the record to point out specifically the conscientious action on behalf of all Selective Service officials involved because, as stated, no claim is made that a fair hearing was not granted.

Appellant does quote the correct rule of review from the *Stanziale* case (Br. 12), but states that he believes it "too broad." Tacitly, he admits its validity but erroneously denies its authoritative value in this case. He cites the

case as good authority for another point (Br. 11) and does not attempt to criticize it by anything more than the valueless and general remark.

Appellant does contend (Br. 28) that the appeal board was arbitrary, capricious, and erroneous in its actions simply because there were in the file sent up by the local board three Statements of Personal Privilege [R. 84, 88, 96]. Therefore, appellant argues, the board of appeal considered those statements and because appellant was not advised that the Statements were in the file or given an opporunity to meet any allegations therein, the appeal board's action was erroneous and arbitrary. It should be carefully noted that that complaint is the only one directed against the appeal board. Even without any examination of the Statements, or the facts concerning their presence in the file, it is submitted that their mere presence is certainly not evidence that the appeal board did not act fairly and honestly. Further consideration will be given the matter hereinafter, but it must be presumed that the appeal board, in the absence of evidence to the contrary, considered such statements in their proper perspective.

2. *In reviewing the action of the board of appeal to determine whether it afforded the registrant a fair hearing, it must be presumed, in the absence of evidence to the contrary, that the board of appeal acted fairly and honestly.*

It is, of course, unnecessary to cite authorities for the above rule. However, see *Graf v. Mallon* (C. C. A. 8), 138 F. (2d) 230, 235, and *United States v. Kinkead* (D. C. N. J.), 248 Fed. 141, 145.

There is, nevertheless, a constant temptation to assume that what is believed to be a wholly erroneous draft classification is proof of the denial of a fair hearing by the board of appeal, but it should be remembered that lack of a fair hearing is not established by showing error. *Chin Yow v. United States,* 208 U. S. 8. It may be contended that it is most difficult to produce evidence that a board of appeal has not fairly considered a registrant's case, if evidence of erroneous classification is not considered as sufficient to overcome the presumption of fairness. We concede that such proof is difficult to obtain, and it is difficult because the boards of appeal in fact do act fairly and impartially. Proof of a nonexistent fact is always difficult to obtain.

The experience under the 1917 Act demonstrated that boards of appeal are entitled to the full force and effect of this presumption of regularity and fairness. The work of boards of appeal, then known as district boards and given original jurisdiction over occupational deferments, was described as follows:

> . . . they provided a check on irregularities by local boards, promoted uniformity in the application of the law, and assured to every registrant the opportunity of a rehearing before a court removed from local prejudice and influence. . . . These responsible and burdensome obligations demanded the selection of members not only representative of the leading divisions of our population, but possessed of experience, breadth of view, and executive ability. . . .
>
> The immediate infusion into the selective service system of this group of able and highly patriotic civilians went far in itself to vindicate the wisdom

> of intrusting to local agencies the raising of our armies. . . .
>
> The rule of the district boards commanded attentive study by all large employers of labor and became of vital interest to the farmer as the supply of labor waned. It was then that the caliber of the district boards received its severest test, and that its members performed their most valuable service to the country. (Second Report of the Provost Marshal General on the Operation of the 1917 Act, pp. 268-9.)

The same is true under the 1940 Act. This is illustrated, we believe, by the fact that after almost four years under the 1940 Act and the induction of millions of registrants there are only two reported habeas corpus cases in which the courts have ordered inductees released from the armed forces where board of appeal action has been involved.[3]

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[3]These two cases are *United States ex rel. Phillips v. Downer* (C. C. A. 2), 135 F. (2d) 521, which involved a question of statutory interpretation, and *Application of Greenberg* (D. C. N. J.), 39 F. Supp. 13, which was criticized in *United States ex rel. Tranin v. Cain, supra,* and Bullock, *Judicial Review of Selective Service Classifications by Habeas Corpus, supra.* The only other reported cases in which the courts have released inductees from the armed forces under the 1940 Act, aside from cases involving forcible inductions (see *Billings v. Truesdell,* 321 U. S. 542), are *United States ex rel. Beye v. Downer* (C. C. A. 2), 143 F. (2d) 125 (The local board had disregarded the requirement that a rejected registrant be reclassified, resulting in a denial of appeal); *United States ex rel. Degraw v. Toon* (D. C. E. D. N. Y.), 52 F. Supp. 170 (The local board did not grant a personal appearance before reclassification following discharge from service. An appeal by the government to the Circuit Court of Appeals is pending in this case.); *United States ex rel. Bayly v. Reckard* (D. C. Md.), 51 F. Supp. 507. (The local board disregarded the order of call.) In addition, there is the case of *United States ex rel. Reel v. Badt* (C. C. A. 2), 141 F. (2d) 845, which was remanded for further evidence and which is still pending. It should also be noted that the unreported case of *United States ex rel. Swatzka v. Sullivan* (D. C. W. D. Wash.), decided June 1, 1944, is now before this court on appeal by the government, the District Court having ordered Swatzka's release from the Army because of what it found to be an illegal denial of an agricultural deferment.

Our inquiry should end here because appellant neither averred or charged that the board of appeal, or even the local board, refused to receive and consider evidence submitted by appellant as a registrant. There is certainly no evidence that they acted unfairly, dishonestly, arbitrarily, or capriciously. The trial court, with the appellant and the entire draft board file before it, could not find that either the appeal board or the local board acted in an arbitrary and capricious manner [R. 112]. But, as hereinbefore noted in the discussion of appellee's position, we will go even further than we deem necessary, to argue that even under the scope or rule of review proposed by appellant the decision of the trial court should be affirmed.

E. Even if the Scope of Review Proposed by Appellant Is Accepted as the Proper Rule to Be Invoked in This Case, the District Court Did Not Err and Its Action Should Be Affirmed.

1. *The rule of review proposed by appellant.*

It is difficult to determine exactly which rule of review appellant stands upon. His attention to the rule endorsed in the *Stanziale* case has been already considered (*supra,* p. 27). We do not believe it wrong to state that appellant, at this point at least, properly endorsed that rule, and, as noted, the acceptance thereof should end this case. However, appellant does state that the rule in *Benesch v. Underwood* (C. C. A. 6), 132 F. (2d) 430, "would seem" to be the correct one (Br. 12). It should be noted though that the "substantial evidence" rule quoted by appellant was taken by the *Benesch* opinion from *Rase v. United States* (C. C. A. 6), 129 F. (2d) 204, a criminal

case, and that actually the *Benesch* case made the following finding:

> "We find here, as we did in our previous decision cited, no evidence of arbitrary or capricious conduct on the part of the draft boards, or a failure by the draft boards to afford a full and fair hearing. On the contrary, the record reveals scrupulous and proper official conduct on the part of both the local board and the board of appeals."

Therefore, the actual finding in the *Benesch* case indicates an adherence to at least the spirit of the rule in the *Stanziale* case rather than to the "substantial evidence" rule. On the other hand, contentions by appellant throughout his brief indicate a preference to the "no evidence" rule, without clearly defining which rule he actually advocates.

In either case, the merit of appellee's position that the proper rule is the "fair hearing" rule is shown when the application of the other rules to the particular situation presented in this case is attempted. The court herein is clearly called upon to re-litigate the matter without having before it all the evidence which was before the local board and board of appeal. And, in effect, appellant is asking the courts to reclassify him. Admittedly that is a function which the courts have no power to perform.

2. *Answer to Point I of appellant's argument.*

A careful analysis of Point I of appellant's argument (Br. 8-30) discloses that all of his contentions thereunder may be summed up by stating that he asserts that the

local board's classification was made without *any* evidence to support it.[4]

The court will presume that the findings of the boards were based upon substantial evidence and were not arbitrarily or capriciously made. Therefore, the burden is on the registrant to establish the contrary. *Graf v. Mallon, supra.* Appellant has, it is submitted, not only failed to support that burden but the boards' action is supported by substantial evidence and is therefore not arbitrary or capricious.

Previously in this brief certain elements or fundamental features of the Selective Service System were reviewed.[5] All those elements must be carefully considered in this case where it is alleged that the boards were arbitrary because the evidence did not warrant the classification.

It is normally not possible for a court to have before it all the facts which properly enter into the action of the boards; for example, the oral testimony given by appellant on October 12, 1943. Even when it is possible, it

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[4]Subdivision 1 (Br. 9-11) concerning an alleged violation of the Act and Regulation is based on the argument that there is no evidence to support the reclassification under Regulation 622.25. Subdivision 2 (Br. 11-16) directly states that the local board's decision was not supported by any substantial or competent evidence. Subdivision 3 (Br. 17-28) contends, in effect, that because the local board's decision was without any evidence to support it, it acted in an arbitrary, unfair, and capricious manner. Joined to that subdivision is the only reference appellant cares to make regarding the appeal board's action, and it is argued that because certain statements were in the file before the appeal board, it must have considered the same. Therefore, its action was, appellant argues, arbitrary and capricious. Subdivision 4 (Br. 29) argues that the local board abused its discretion and exceeded its authority in a final decision unsupported by evidence save the opinions and conclusions of the South Dakota War Board. Subdivision 5 (Br. 30) alleges a denial of due process because of all the previous grounds of error.

[5]The selection of men for the armed forces is in no way an adversary proceeding. 2. Local boards and boards of appeal are selected for their knowledge and understanding of conditions which affect the equities of individual classifications. 3. Boards must have the element of informality; *e.g.*, no facilities for making stenographic reports. 4. Selective Service classifications usually involve matters of judgment. 5. The boards are not required to make findings of fact.

usually develops that there is, at the most, only an error in classification. This does not establish a denial of a fair hearing (*Chin Yow v. United States, supra*), or arbitrary and capricious action.

Turning to the evidence before the Selective Service boards, substantial evidence is found to support the classification. In the first place, it is admitted by appellant that the local board might consider certain matters relating to its previous classification of the registrant [R. 109, 110; Br. 40] which are not before this court. It is fundamental that where an appeal court is called upon to review the findings of a trial court because its conclusion of fact is opposed to the evidence, all the evidence adduced must be presented to the reviewing court, and, in the absence of a proper showing that all the evidence is thus presented, it will be assumed that other evidence not so presented was adduced and justified and required the conclusion reached. *Tricou v. Helvering* (C. C. A. 9), 68 F. (2d) 280, cert. den., 292 U. S. 655.

Further, the board may consider the sincerity, good faith, and veracity of the registrant. *Ex parte Stewart* (D. C. S. D. Calif.), 47 F. Supp. 410; *United States ex rel. Errichetti v. Baird* (D. C. N. Y.), 39 F. Supp. 388; *United States ex rel. Ursitti* (D. C. N. Y.), 39 F. Supp. 872. And even if the board's decision was based principally upon discrediting the registrant's testimony that does not of itself justify the conclusion that the determination of the board was improper. *United States ex rel. Cameron v. Embrey* (D. C. Md.), 46 F. Supp. 916.

Appellant bases his entire charge of lack of evidence on the letters from the United States Department of Agriculture War Board, Douglas County, South Dakota, referred to as the "DeVelder correspondence." Appellee

cannot agree that the "only possible support" for the action of the local board and the appeal board is to be found in the said letters (Br. 19). As pointed out by the trial court in its decision [R. 109, 111] and by appellee herein, matters confront the local boards which cannot be made available for a review of their action. But admittedly the letters were important, and it is believed that they constitute substantial evidence.

These letters were sent to the local board upon its request [R. 56]. They are not letters presented to the local board by some self-chosen or voluntary investigative agency, but constitute the assistance given to the local boards in reaching their determinations upon the recommendations of the National Headquarters of the Selective Service System [Br. App. 9] and upon the authority of Regulation 621.7.

Most, if not all, of appellant's complaint against the letters is directed to the fact that they could have been better and that some further investigation might have been made. Assuming for argument the truth of such charge, this evidences merely another attempt on the part of appellant to relitigate the entire matter or test the matter as an adversary proceeding. The fact that the evidence might have been more substantial or that it directed the attention of the local board to other evidence is an argument made properly before the boards and incompetently before the courts.

After complaining about the merits of the letter of August 18, 1943 [R. 55], appellant sluffs off the letter of October 30, 1943 [R. 62], by saying it was a gratuitous gesture and not based on facts (Br. 24). This latter letter it should be noted is a report from the War Board made after carefully investigating and checking the rec-

ords of the registrant. True it does not state the records checked nor the investigating done, but it is a definite and forthright answer from a governmental agency specified to give such answers.

Appellant by adroit, although faulty, logic contends that the chairman of the local board fell into a violation of paragraph 6 of The Bulletin (Br. 25) when the chairman wrote that the report from the U.S.D.A. War Board made it "almost mandatory" to classify registrant in I-A, and that he carried along with him the other members of the board. The fact that two members did not follow or that the appeal board could not be charged with such a mandatory position is not mentioned. The trial court in its decision fully answers the contention by holding that "by the pointing out of one item or error are we to conclude that all of the rest of the evidence was discarded" [R. 111] and "if it is possible that the local board arrived at an erroneous deduction, then the appeal board should have certainly corrected the erroneous deduction" [R. 112].

Mention should be made of the contention that the appeal board was guilty of unfair, arbitrary, and capricious action because the Statements of Personal Privilege were in the file (Br. 28). The answer to that contention may be more conveniently handled hereinafter (*infra,* p. 39) when those Statements are considered.

As a matter of law, because the action of the local board is superseded by that of the board of appeal, any question of arbitrary and capricious action must be limited to that of the appeal board. And it should be noted also that no charge of such conduct is attributed to the State Director of Selective Service.

F. The District Court Did Not Commit Any of the Errors Claimed by Appellant in Points II, III, and V of His Argument, but if Any Errors Were Committed, None of Them Were Prejudicial to the Appellant.

1. *Answer to Point II of appellant's argument.*

Appellant in his Point II (Br. 31) specifies as error the statement made by the trial court that the action of the appeal board supersedes the action of the local board [R. 104]. That the trial court was entirely correct is shown by the opinions in *Bowles v. United States, supra,* and *United States v. Pitt, supra,* and other authorities cited under Point "C" herein. It is contended that the trial court under authority of the *Bowles* case could have gone even further because the ruling of the State Director of Selective Service had superseded the action of the appeal board.

However, it would seem that the statement by the court, even if erroneous, would not be prejudicial in this matter because that court considered the records on its merits [R. 104] and directly found in accordance with what appellant agrees is the proper theory; *i.e.* that the local board and the board of appeal did not act in an arbitrary and capricious manner [R. 112]. The entire opinion of the court [R. 100-112] is replete with evidence that the trial court did consider the action of the local board in arriving at its decision.

2. *Answer to Point III of appellant's argument.*

Appellant in his Point III (Br. 34) specifies as error the court's holding regarding the ruling that the local board had complied with Section 627.13 of the Regulations concerning a written Summary.

It is questionable whether a written Summary need have been made at all in the matter. Section 621.13 requires "if any facts considered by the local board do not appear in the written information in the file," the Summary should be prepared and filed. It is significant that *no error is claimed because the board did not file the Summary*. The only error claimed is that answers [Statements of Personal Privilege: R. 84, 88, 96] to the written statement were made and placed in the file without advising appellant that such had been done and without giving him an opportunity of meeting any of the statements therein. This, appellant urges, is proof of arbitrary and capricious action on the part of the board.

Even more questionable is whether the statement made by the registrant should have been in the file at all. The fact that the local board allowed the statement to go in is an indication of the extreme lengths it went to to allow a complete and fair hearing.

A reading of the Summary of Oral Matters [R. 72] immediately discloses that the purpose of the statement was to present to the appeal board the registrant's charge of prejudice and unfairness. The particular point made of the entire matter is another indication of appellant's insistence in making an adversary proceeding of the entire matter. There is no known right to contradict or refute a summary, if this be one, or to continue the argument after the hearing. The registrant wanted to make a written statement regarding his treatment at the oral hearing; some of the members of the board wanted to deny the insinuations and charges therein. It would appear that to forbid the members of the board to deny the insinuations would be manifestly unfair.

It is pertinent at this point to mention again the basis for the only charge made against the board of appeals; *i. e.,* its alleged consideration of the three statements of Personal Privilege [R. 84, 88, 96] without allowing appellant to meet the statements therein. A cursory reading of the statements in answer to appellant's Summary indicates the correctness of the trial court's belief that the appeal board could separate the wheat from the chaff [R. 109]. It appears to appellee that what appellant is getting at indirectly is a claim of prejudice on the part of the Selective Service boards. His Summary [R. 72] indicates such an attitude, and the fact that the only charge of arbitrary and capricious action leveled against the appeal board is made solely on the basis of a presumed consideration of the three Statements is further evidence thereof. One of the main reasons for having boards of appeal is to cure any possible error caused by such prejudice, and it is difficult to conceive of a case in which all the members of the board of appeal would be prejudiced against a registrant. Certainly nothing in this case would indicate such prejudice on the part of the appeal board.

3. *Answer to Point V of appellant's argument.*

Appellant in his Point V (Br. 40) claims that the trial court made a certain erroneous holding regarding manpower requirements when as a matter of fact the court made no holding whatsoever on that point. The trial court specifically noted that "the regulations provide that [quotas] shall not influence their judgment" [R. 110].

It did not hold that the local board could consider the manpower requirements nor did it take such requirements into consideration in arriving at its decision. The matter was mentioned in passing and it was obviously not prejudicial.

Conclusion.

For the foregoing reasons, we contend the decision below should be affirmed.

Respectfully submitted,

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JAMES M. CARTER,
Assistant United States Attorney.

ARTHUR LIVINGSTON,
Assistant United States Attorney.

APPENDIX.

Selective Service Regulations.

621.1 *Mailing Questionnaires.* (a) The local board shall mail a Selective Service Questionnaire (Form 40) to each registrant in strict accordance with the order numbers, from the smallest to the largest. Selective Service Questionnaires (Form 40) shall be mailed as rapidly as possible, consistent with the ability of the local board to give them prompt consideration upon their return.

621.2 *Time allowed to return Questionnaire.* (a) Unless the local board grants an extension of time, as explained below, the registrant shall complete and return his Selective Service Questionnaire (Form 40) within 10 days after the date on which it is mailed to him. * * *

(b) If the registrant has a valid reason, the local board may grant an extension of time for returning the Selective Service Questionnaire (Form 40). Examples of valid reasons are:

Too sick to answer the Selective Service Questionnaire (Form 40).

Too far away to receive and return the Selective Service Questionnaire (Form 40) by mail within 10 days.

621.3 *Special Form for Conscientious Objector* * * *

621.4 *Claims, for, or information relating to, deferment.* * * *

621.5 *Inadequate Questionnaire.* * * *

621.6 *Assistance to registrants in filling out Questionnaires.* Advisory boards for registrants will help registrants fill out Selective Service Questionnaires (Form 40).

The local board shall request newspapers to publish full information about the advisory boards for registrants. Registrants who ask the local board for advise or assistance will be directed to members of the advisory board for registrants.

621.7 *Securing information from welfare and governmental agencies.* (a) The local board is authorized to request and receive information from local welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant.

(b) The local board is authorized to request the State Director of Selective Service to secure information from State or national welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant. * * *

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623.1 *General principles of classification.* (a) Each registrant shall be classified as soon as practicable after his Selective Service Questionnaire (Form 40) is received by the local board or as soon as practicable after the time allowed for him to return his Selective Service Questionnaire (Form 40) has expired.

(b) It is the local board's responsibility to decide in the first instance the class in which each registrant shall be placed.

(c) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice.

623.2 *Information considered for classification.* The registrant's classification shall be made solely on the basis

of the Selective Service Questionnaire (Form 40), Affidavit of Dependent Over 18 Years of Age (Form 40A), Affidavit—Occupational Classification (General) (Form 42), or Affidavit—Occupational Classification (Industrial) (Form 42A), and such other written information as may be contained in his file; * * *. Oral information shall not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in registrant's file.

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623.61 *Classification and change of classifications.* (a) As soon as practicable after the local board has classified or changed the classification of a registrant, it shall mail a notice thereof on a Notice of Classification (Form 57) to the registrant. * * *

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625.1 *Opportunity to appear in person.* (a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (Form 57) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

(b) No person other than the registrant may request an opportunity to appear in person before the local board.

(c) If the written request of the registrant to appear in person is filed with the local board within the 10-day period or if it is filed after such 10-day period and the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control, the local board shall enter upon the Classification Record (Form 100) the date on which the request was received and the date and time fixed for the registrant to appear and shall promptly mail to the registrant a notice of the time and place fixed for such appearance.

(d) If such a written request of a registrant for an opportunity to appear in person is received after the 10-day period following the mailing of a Notice of Classification (Form 57) to the registrant, the local board, unless it specifically finds that the registrant was unable to file such a request within such period because of circumstances over which he had no control, should advise the registrant, by letter, that the time in which he is permitted to file such a request has expired, and a copy of such letter should be placed in the registrant's file. Under such circumstances, no other record of the disposition of the registrant's request need be made.

625.2 *Appearance before local board.* (a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the proper place on the Classification Record (Form 100). If the registrant does not speak English adequately, he may appear with a per-

son to act as interpreter for him. No registrant may be represented before the local board by an attorney.

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified, provided that if he has been physically examined by the examining physician, the Report of Physical Examination and Induction (Form 221) already in his file shall be used in case his physical or mental condition must be determined in order to complete his classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on

the Notice of Classification (Form 57) to the registrant and on Classification Advice (Form 59) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 623.61.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification.

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627.1 *Who may appeal any determination of a local board to a board of appeal at any time.* (a) Either the Director of Selective Service or the State Director of Selective Service as to local boards in his State, may appeal from any determination of a local board.

(b) Either the State Director of Selective Service or the Director of Selective Service may take such an appeal at any time.

627.2 *Who may appeal registrant's classification to board of appeal under certain circumstances.* (a) The registrant, any person who claims to be a dependent of a registrant, any person who has filed written evidence of the occupational necessity of a registrant, or the government appeal agent may appeal to a board of appeal from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition by the examining physician, the examining station of the armed forces, or the local board.

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627.12 *Statement of person appealing.* The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement

specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

627.13 *Local board to transmit record to board of appeal.* (a) Immediately upon an appeal being taken to the board of appeal, the local board shall carefully check the registrant's file to make certain that all steps required by the regulations have been taken and the record is complete. If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts. In preparing such a summary the local board should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision.

(b) Immediately upon determining that all steps required by the regulations have been taken and that the record is complete, the local board shall transmit the file to the board of appeal, provided that the State Director of Selective Service may direct the channels through which such file shall be forwarded to the board of appeal.

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627.23 *Preliminary review.* The board of appeal will carefully check each file to determine whether all steps required by the regulations have been taken, whether the record is complete, and whether the information in the file is sufficient to enable it to determine the registrant's

classification. If any steps have been omitted by the local board, if the record is incomplete, or if the information is not sufficient to enable the board of appeal to determine the classification of the registrant, the board of appeal shall return the file to the local board with proper instructions. If the board of appeal returns the file to the local board, it shall enter the date of the return in column 4 of the Docket Book of Board of Appeal (Form 102).

627.24 *Review by board of appeal.* (a) The board of appeal shall consider appeals in the order in which they are received.

(b) In reviewing the appeal, the appeal board shall not receive or consider any information which is not contained in the record received from the local board except (1) the advisory recommendation from the Department of Justice under section 627.25, and (2) general information concerning economic, industrial, and social conditions.

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627.26 *Decision of board of appeal.* (a) The board of appeal shall classify the registrant, giving consideration to each class in the order in which the local board gives consideration thereto when it classifies a registrant; provided that the board of appeal shall not give consideration to Class IV-F because of physical or mental disability.

(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, however, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 626.

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628.1 *Who may appeal to the President from any determination of a board of appeal.* (a) When either the State Director of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of a board of appeal. He may take such an appeal at any time.

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628.2 *Appeal to the President.* The registrant or any person who claims to be a dependent of the registrant or any person who has filed written information as to the occupational status of the registrant, at any time within 10 days after the mailing by the local board of the Notice of Classification (Form 57), notifying the registrant that the local board classification has been affirmed or changed, may appeal to the President provided the registrant was classified by the board of appeal in either Class I-A, Class I-A-O, or Class IV-E and one or more members of the board of appeal dissented from such classification. The local board may permit any person who is entitled to appeal to the President under this section to do so, even though the 10-day period herein provided for such an appeal has elapsed, if it is satisfied that the failure of such person to appeal within such 10-day period was due to a lack of understanding of the right to appeal or to some cause beyond the control of such person. Unless the local board permits such an appeal, the right of such persons to appeal to the President shall terminate at the end of the 10-day period herein provided.